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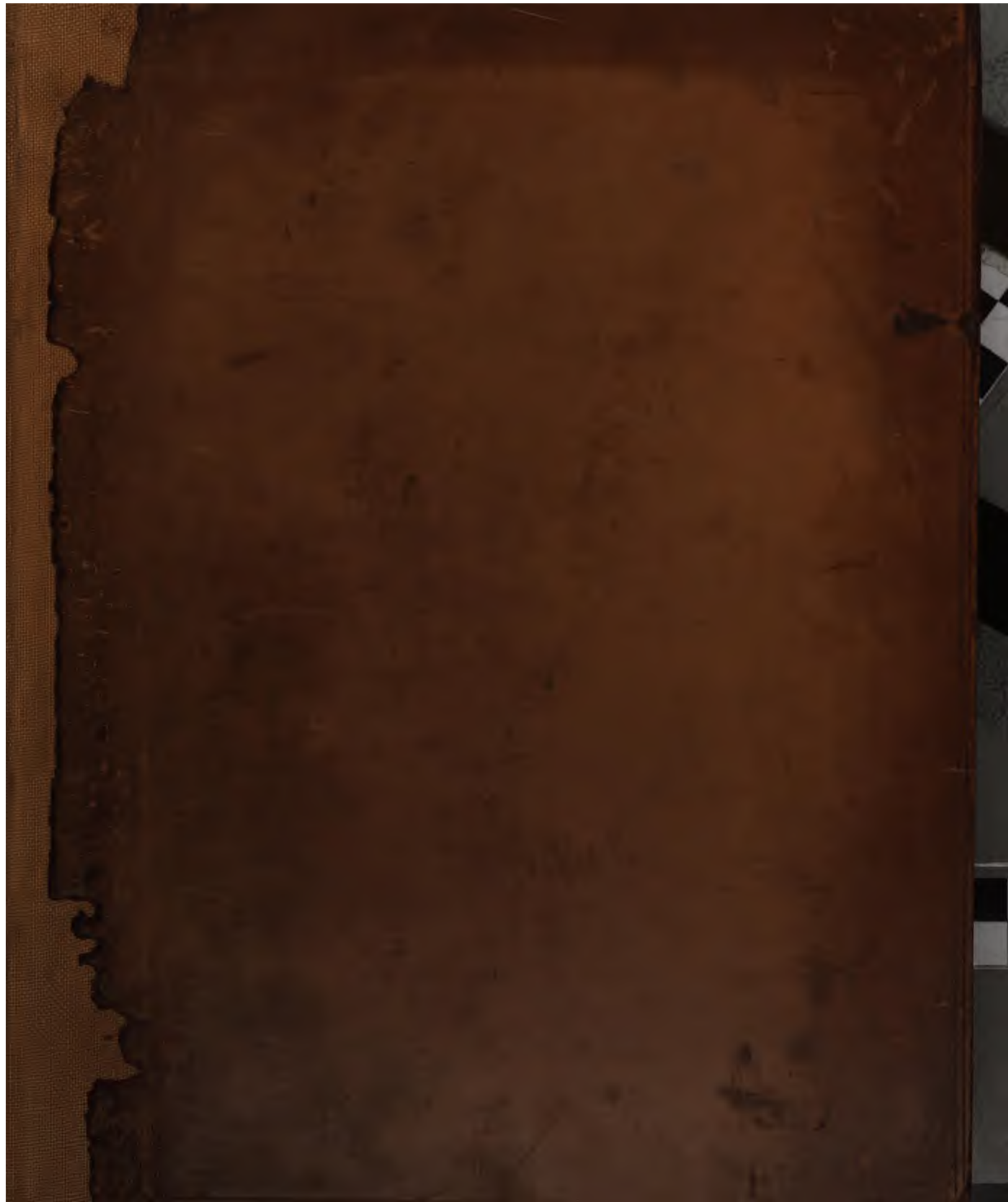
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LECTURES
ON THE
HISTORY AND PRACTICE
OF THE
LAW OF SCOTLAND,
RELATIVE TO
CONVEYANCING AND LEGAL DILIGENCE.

By **WALTER ROSS, Esq.**

WRITER TO THE SIGNET.

THE SECOND EDITION.
TO WHICH IS ADDED
A DISCOURSE ON THE REMOVING-OF TENANTS,
AND
A GENERAL INDEX.

IN TWO VOLUMES.

VOL. II.

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ERRATA IN VOLUME II.

Page 10, line 12 from top,	for	<i>Chancellary</i>	read	<i>Chancery.</i>
17, first line,	—	<i>has</i>	—	<i>have.</i>
62, line 7 from top,	—	<i>Majesties</i>	—	<i>Majesty.</i>
96, line 2 in note,	—	<i>prolo</i>	—	<i>prole.</i>
132, line 12 from top,	—	<i>indicates</i>	—	<i>indicate.</i>
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172, line 18 from top,	—	<i>mars</i>	—	<i>marks.</i>

L E C T U R E S
ON THE
P R A C T I C E
OF THE
LAW OF SCOTLAND.

Introductory Discourse.

THE last Course of Lectures was employed in explaining those deeds and diligences which regulate and affect the property of moveables, and the practice of Scotland with respect to them; and we gave that subject the preference, because it is upon such deeds that young gentlemen in our profession are always at first employed. We now enter upon the capital branch of our practice, the *Rights of Heritable Property*; and we shall endeavour to give the history of their origin, and their principles; to trace them in their progress through the intervening ages, and mark the variations they have undergone,

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undergone, till we arrive at the constitution of the titles to land, and other real estates, as presently established. Although, at first view, the inquiry promises no other than a dull entertainment, we hope it will not prove disagreeable. The want of objects grateful to fancy will be supplied by necessary information; and if ornamental flowers are not frequent upon the road, useful plants will every where be found.

The very first approach to the art of conveyancing discovered, that there was a capital defect in the method of studying it, disgusting to every person who wished to find in his profession employment for the mind, and to be attached to it upon the principles of science. The first book we are taught to look up to for instruction, is that large collection of forms, laboriously put together by Mr Dallas of St Martin in the last century. We are desired to view this vast opaque body almost without the aid of light. Mr Dallas himself thought he did a great deal, and his brethren are no doubt very much indebted to him, for having put together such a large and varied collection under certain general heads: But, if we want to know from whence these forms originated; whether they arose from our own laws and usages, or were borrowed from our neighbours; at what period, or from what emergency of circumstances these writs became necessary; what were the first and primitive forms in which they appeared; or at what period of our law, or advancement in our manners, they came to be lengthened out to the shape they are found in; what parts of them, of consequence, are essential, and what are of lesser moment, or of mere form, the research from the work itself would be vain. Mr Dallas does not seem to think that these explanations were in any degree required of him. 'Let no man,' says he, 'so far deceive himself, as to conclude that speculative knowledge, or theory, without the practical, will ever make a complete penman: But by the method taken, a man, by education, may attain to more knowledge in two, than formerly in seven years.' Now, what is the method our author here alludes to? It is no other than a
drudgery

drudgery more tedious and disgusting than is to be found in the acquisition of the lowest art in which mankind are employed. In every one of these, a degree of ingenuity is at least requisite; but here no exertion is required, except that puerile one of copying a part of one style into another, *mutatis mutandis*. The mind revolts at condescending to such low and sterile application; and the young Writer is thus forced to depend upon the sure, but tardy mistress, experience, for that limited portion of knowledge which is just necessary to carry him decently through his business. Supposing a person to summon up sufficient courage and patience to look these forms in the face, to separate the useful from the useless, the old from the new, and obtain a mastery over them, and the language in which they are composed, the first difficulty he meets with is a number of clauses, of forms, and of technical terms, which have no visible relation to any law, custom, or usage, discoverable either in our law books or our practice. It is with astonishment he finds, that our systematic lawyers, the only sources of knowledge to which we are taught to apply, afford little or no instruction relative to the history, the progress, or the import, of the common writs and forms belonging to the jurisprudence they profess; yet certain it is, that these styles have been, and still ought to be, the foundation, and the most assured records of the common law of the kingdom. If we go a step farther back, to the more ancient deeds of a century or two preceding, we find ourselves altogether in a strange country. The styles, the ceremonies, the manners, and the laws, to which these deeds have related, are so extremely different from what we are now acquainted with, that we should never have suspected the one to have been ever produced from, or succeeded by, the other. Nay, it requires the most intense application to be able to discover those hidden relations and analogies which give evidence of their having belonged to the same country, or the same people. Although our history acknowledges no revolution in the kingdom; although no Dane or Norman ever trampled upon the constitution of this little country,

or commanded its laws to give place to a foreign jurisprudence, yet, without conquest, and without force, a revolution, almost total, has certainly taken place in the laws and customs of Scotland; a revolution which has been attended with effects equally subversive of the common law and usages of our ancestors, as the Norman conquest proved of those of the Anglo-Saxons. To this revolution, though not a sudden one, are to be imputed the capital differences which now exist between the laws of England and Scotland, which, both in principles and in practice, were originally the same.

The same revolution is to be charged with that remarkable difference in the mode of treating the science, in the works of the lawyers of England, and in those of Scotland. The former carefully build every part of their superstructure, either upon the common or statute law of their country. The common or municipal law consisted of those consuetudes which had regulated their ancestors for ages, and which were, and continue to be, the glory of their nation. But where did their great lawyers seek for the certainty of these consuetudes? Every one of them concurs in declaring that he sought it in the words and forms of ancient deeds; in the ceremonies which existed relative to those deeds; in the public records; and in that best of guides, the *Registrum Brevium*; the collection of briefs which had, beyond all other record, issued in virtue of the common law, and of consequence afforded the surest evidence of its import. Ranulphus de Glanville, Chief Justice of England under Henry II. who is allowed to be the first who published a systematic treatise upon the laws of that kingdom, is careful, so often as he treats of a particular plea, or ground of law upon which an action can be founded, to give and to explain a copy of the brief which was to be taken out from Chancery upon that occasion; so that every book has a suit of briefs and forms of writs relative to itself; and, indeed, of these common law writs, with the process upon them, the work itself principally consists. What is the famous treatise of Judge Littleton upon tenures, the corner-stone of the common law of England, but

but a simple commentary upon the words and formulas of grants, feofments, and other instruments and assurances of the land property of the kingdom at that time? And what is the celebrated work of Lord Coke, but a commentary and enlargement of what was delivered by the old judge Littleton; an explanation of every technical or antiquated term; a history of the progress and alterations which these deeds and assurances have undergone since the days of Littleton; and an illustration of each circumstance necessary to connect the elder laws with the later jurisprudence, and to account for the one upon the principles of the other. It is unnecessary to multiply instances of a fact so well known. There is not an English writer of consequence to be found, from Glanville to Blackstone, who does not build upon forms, who does not keep them ever in his eye, and who does not carry the learning and the practice of writings, whether judicial or voluntary, along with the theory of the law.

Let us now turn to the law of Scotland, and its writers. The English had their Glanville in the end of the 12th century: We have no author of a known or certain name till about four hundred years afterwards, *i. e.* till the days of Sir James Balfour, Sir John Skene, and Sir Thomas Craig, whose works appeared about the beginning of the 17th century. Sir John Skene only collected and published a number of treatises from the MSS. then in circulation, part of which were considered as authoritative; the remainder being the works of anonymous authors, composed upon particular branches of our law and practice, for their own amusement or instruction. Of these Sir John Skene published no more than he thought proper. This country, however, will ever be indebted to him for his labours. His notes upon the *Regiam Majestatem*, and the statutes of our elder Princes, bear evidence of a knowledge in the statute laws of England, superior to what any of our lawyers have discovered since that time. He has marked the analogies of our statutes, and several of our customs, with ingenuity and precision, while his treatise de *Verborum Significatione*, exhibits an acquaintance with the antiquities

ties of his country, which seem to have been afterwards totally neglected. That little glossary keeps its ground among foreign antiquaries, and was all that we had to set up against a Camden, a Selden, and a Spelman. In doing this justice to Sir John Skene, we must, at the same time, observe, that he has left a number of tracts unpublished, which would have been of the greatest use in illustrating the history and the forms of our law. With regard to forms themselves, he has given us none but a few of the brieves which belong to the Regiam Majestatem, and these neither in order nor complete. Of ancient deeds, there is only one or two to be found in his book *de Verborum Significatione*. This conduct in a lawyer who had a natural taste for antiquity, clearly indicated that the right path was about to be deserted. It was an error to consign these remains to destruction, if he found them, as he says, in such a confused and perishable situation. If any of these books were of ancient authority, they deserved to be preserved; and, if others of them contained the old forms of Scotland, they could not be but valuable to the antiquary, the historian, and the lawyer. The learned men of our neighbouring country, who have employed themselves in labours of the same kind, held a different opinion, and speak a different language. The learned and modest Mr Maddox, in the preface to his valuable collection of ancient deeds, published under the title of *Formulare Anglicanum*, begs of his readers who might be apt to object the want of apparent value to many of his forms, ‘to call to mind, that several monuments of antiquity, which at first sight appeared of little value, have afterwards been found to serve some considerable use; the designs of learned men in their study being so various, that many things of antiquity prove of good use to some that are of little to others: And I think one may say, in general, that for want of a due inspection and use of ancient records and monuments, many crude and precarious things have been advanced concerning our laws and constitution.’ The reasons of Sir John Skene’s conduct are apparent. The lawyers, even in his time, had

had deviated far from the right path. They had neither pleasure nor curiosity in the common law or usages of their own country, and were totally absorbed in the learning of the civil and canon systems, and in the endless subtleties and commentaries of the Continental Doctors of these laws. From such copious sources our lawyers found themselves furnished at once with inexhaustible arguments, and figured cases, which, independent of the usages of their own country, supported their reasonings and oratory at the bar.

The disposition which appears thus partially in Skene, is to be seen complete in our first, as he may be justly termed, and favourite writer, the learned and elegant Sir Thomas Craig. He can scarcely bring himself to confess that we ever had any municipal law or custom, peculiar to ourselves: Every thing, it seems, was regulated by the civil and canon codes, but more especially by the feudal law, which he dignifies with the title of 'the proper law of this kingdom.' Is it possible that this great writer could be ignorant of the laws by which the moveable property of his country was governed anterior to the reign of James V. or the institution of the College of Justice, which happened only ten years before his own birth? and yet he expressly acknowledges this ignorance. 'It is credible,' says he, 'that the Judges of the old Session determined according to 'the civil and canon laws.' Can such a position be held by any man who reads even the statutes of that period, in every part of which he finds allusions to established customs, not only unconnected with, but sometimes opposite to, both these systems; and are not many of these usages existing in our law at this moment? With regard to the common law in heritage, did it not then, and does it not yet differ from, and stand in contradiction to, the written feudal law, in a great variety of cases? The farther back we go, do not we find these differences grow wider? Sir Thomas Craig rejects the *Regiam Majestatem*, and treats with marked indifference almost every part of the old Scottish code published by Skene. If he doubted the authenticity of these evidences of national jurisprudence, would it

it not have been proper and natural for this great man to have had recourse to those unquestionable monuments of it, the public records, and the ancient deeds and instruments, with which the charter chest of every family was filled. A loud complaint has been made by all our historians, and all our lawyers, that Scotland was robbed of her records, and public monuments, by Edward I.; that they suffered from intestine commotions; and were ruined a second time at the Reformation: But, granting these things to be true, do they afford an excuse for a total neglect of what remained? But they are not true, neither in the manner, nor to the extent, which our countrymen have pretended. At any rate, the deeds of private men were not destroyed; nay more, the fixed style of the judicial writs were every where to be had. The forms of Chancery were at hand, from which a *Registrum Brevium* for Scotland might with ease have been collected. The brieves, or writs, of course, must be the foundation of the common law of any country which admits them. When Henry III. imposed the laws of England upon the Irish, he did it by a single mandate: ‘*Rex vult, quod omnia brevia de communi jure quae currunt in Anglia similiter currant in Hibernia, sub novo sigillo Regis. Mandatum est, quod pro pace et tranquillitate ejusdem terrae per easdem leges eos regi et deduci permittant, et eas in omnibus sequantur* *.’ An attempt of the same kind seems to have been insidiously made by Edward, when this kingdom was in his hands. Upon pretence that England and Scotland were united by the acknowledgement of his superiority, he ordered brieves dated in Scotland to be returned and received in the King’s Bench. A complete collection, then, of the Scottish brieves would have been a record of a great part of our law; and if to these had been added a proper attention to the words and tenor of the styles and forms in ordinary practice, the common law might have been fixed, and every variation introduced upon it distinctly traced, to the advantage of the kingdom,

* Rhymer, Vol. V. pag. 155. anno 1248.

kingdom, the information of the lawyers, and the establishment of a certain jurisprudence. Now, in place of this, what was the education of our lawyers in the 15th and 16th centuries? If we look into the lives of the great lawyers and Judges of the Court of Session, which have been preserved, we shall find, that they all studied in France, and returned to their own country in quality of *Doctores utriusque juris*. Sir Thomas Craig himself studied only the languages and philosophy in Scotland; for the laws he went to France; and having there completed his studies, he, (as the rest did) without any domestic preparation, entered a pleader before the Lords. So little attention does this great man seem to have paid to his own country, that he does not even know, that both the civil and canon laws had, long before his time, been publicly taught in Scotland. 'Nulli adhuc quod sciam apud nos juris fuerint professores qui jus publice docerent, quod sane dolendum est *.' Influenced by this foreign education, Sir Thomas, in his elegant treatise, sets out with a fixed opinion, and is determined to persuade others, that the whole of our laws and usages are founded on the civil and canon laws; and thence alone their origin and principles were to be deduced. This freed our great author at once from the necessity of any material inquiry into the ancient common law of his country, or into the forms of our writs, public or private. He was certain of being able to explain every thing contained in them upon the principles of the civil or the feudal laws; and thus it has most unfortunately happened, that the man, who from extensive learning, intense application,

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* Since our author was so attached to the jurisprudence of Justinian, does it not almost surpass belief that he should never have taken the trouble of inquiring what had been done for his favourite system in Scotland? Had he even consulted our known historians upon that head, Boethius would have informed him, that James V. procured an act to be made ordering all the great proprietors of estates to study the Roman law; and appointed two public Professors of it, one at Aberdeen, and another at Glasgow.—

Boeth. lib. 17.

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B.

a taste for study, and who, from the circumstance of flourishing at an early period, was perhaps better fitted than any other, either of his cotemporaries or successors, to give his country a complete system of her national jurisprudence, not only endeavoured to destroy the credit of the few books or evidences of the common law which were to be found, but has almost sunk them into oblivion, in favour of two foreign systems, the civil and the feudal laws. We shall have it frequently to observe, that, when our author speaks of any thing that relates to the history of our municipal usages, he does it superficially, and passes them with any story current at the time. Thus he says, *creditur*, it is believed that James I. brought the order of Chancery, and instrument of seifine, to Scotland. Would it not be a fair question to ask, had we no Chancery before the year 1424, when James I. returned from England; or, if we had a Chancery, was it without order? Whence came the brieves mentioned in the undoubted statutes of our Davids, Alexanders, and Roberts? We shall prove that he had a regular Chancery, and show writs issuing from it, near a century before James I. was born. Just such another error is that of the instrument of seifine. This instrument was known in the practice of Scotland long before the return of James I. Mr Erskine, in the Appendix to his Institutes, has published an instance, of date twenty-two years anterior to the time mentioned by Craig; and, when we arrive at the subject, we shall be able to produce many examples of a date still more early. The *Formulare Anglicanum*, published by Mr Maddox, contains all the varieties of deeds and instruments from the Norman conquest to the reign of Henry VIII. In it there are a great number of various certificates to be found, under form of instrument; and among these there are some of the surrender, or, as we would say, the resignation, of lands; but there is not one of the livery of seifine. The English method then was, and still is, to write or indorse a memorandum upon the charter of feofment. In the history of our forms, then, there cannot be a greater error, than that the instrument of seifine was either
borrowed

borrowed from England, or brought by James I. What has been the consequence of this neglect of our ancient law and our records? Sir Thomas Craig quotes no styles, no deeds, no brieves, but the brieve of mortancestry, the charter, and the seisine; and these he illustrates solely upon the principles of the written feudal law, without taking in the peculiarities which they derived either from our own consuetudes, or those of the people by whom it is said they were handed down to us. For the same reasons, when he speaks of our own customs, or the remains of our common law, he has no authority to point at, but is obliged to the information of some of the elder lawyers of the time; and as to our forms, he is under the necessity of leaving them, for the most part, unexplained, and to pass them over just by the name.

The late Lord Kaimes, employing himself in tracing the history and principles of detached parts of our forms, discovered the defects we have mentioned in this capital book of our law. He added some historical notes to his abridgment of the statutes; and in one of them he thus expresses himself: 'Our author appears to be better acquainted with the feudal history of other countries, which might be learned from books, than with the feudal history of his own country, which must be gathered from records. Nor is it wonderful that so polite an author should be followed by Lord Stair, and other late writers.'

Thus it has fared with the common law of Scotland, and with the system of her forms used in the transmission of property, both heritable and moveable; and thence we discover not only why our styles have been neglected, but also the reasons why our systematic lawyers are, like Sir Thomas Craig, either obliged to pass them over in a superficial manner, or, when forced to account for them, are so little to be depended upon. We had formerly occasion to make frequent remarks of that kind; and we shall still be under the necessity of adding many more.

After hearing these several accounts of the treatment of the common law of each country, we can be at no loss for the difference which has ever since been observed in the mode of study, and in the conduct of its professors. The English, partial to their own customs, have searched into their antiquity, traced their progress, collected and studied the forms of their deeds, preserved entire the whole register of their ancient briefs, explained every technical term in practice, and connected the rules of their law with the words and the tenor of the writings to which each of them relate. What has been the consequence of this junction of theory and practice? Attend to it in the words of an honourable judge, lawyer, and antiquary, who at present adorns the bench of our neighbouring kingdom. ‘Will it be said,’ says the honourable Danes Barrington, ‘that the law is uncertain, when there is hardly a difference in opinion between the Judges at the Courts of Westminster upon the variety of points that come before them from year to year; and how few writs of errors are brought from these Judges but for the purpose of delay *?’

We have remarked, that the custom of sending our lawyers, in the 15th and 16th centuries, to France for their education, was the prelude, and the principal cause of the revolution of our laws, which had begun in the reign of James IV. and was well nigh completed in that of his successor. In that country, the Roman laws have, in a great measure, prevailed over their municipal customs. It is in the knowledge, the distinctions, and subtleties, of that jurisprudence that their lawyers have displayed their talents; and what has been the result?—‘The defect of clear and certain laws,’ (says their well informed countryman Voltaire) has always characterised the kingdom of France.’ The application shall be left to daily experience. Solomon has said, ‘that a man of understanding trusteth in the law.’ In some countries, there are few things he could do which would bring his understanding more in question.

Having

* Appendix to Barrington on the Statutes, p. 249.

Having said enough to mark the difficulties which a man in this country has to struggle with, in getting at the genuine history and explanation of our forms, we shall, in the next place, point out the sources from which we have been obliged to draw the necessary information upon this subject.

To attain a satisfactory knowledge of styles, two things are necessary: First to discover, if possible, the originals in each kind, that have either been invented or adopted by our forefathers, and thence to trace the variations they have undergone, from the change of law or of manners, down to the present times. If we are able to accomplish this, the explanation and composition of the forms, as now in use, must not only be rendered easy, but agreeable. From many places of the works of Sir George M'Kenzie, it appears that he was sensible of the injury which the law of his country suffered from the inattention of its capital professors to that part of the science. He was sensible that the omission was a fundamental one. He acknowledges that the words of style are, in the common law, what the words of statutes are in the written law; and that the learning of them had not made a part of his education. It is therefore he says that he had formed a design to acquire that branch of knowledge. Where was he to seek it? He tells us himself, 'in the old rights' and evidents to be found in original papers.' There, and there alone, the origin and progress of our styles, and by what steps they arrived to their present perfection, were to be discovered. Sir George, however, did not find time to put his design in execution.

Another gentleman entertained a plan of the same kind. No man since his time had greater opportunities, or perhaps more capacity; we mean Mr James Anderson Writer to the Signet, the publisher of the *Diplomata Scotiae*. It happened unfortunately, however, that a miserable dispute, about homage claimed by England over Scotland, was most preposterously revived by a Mr Atwood at the eve of the Union. Mr Anderson thought himself called upon to support the honour and the rights of his country. The remainder of his life

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was dedicated to this dispute; and the publication of the *Diplomata*, in the shape we find it, was a consequence of that event. That he had intended to employ his time to better purpose, we find in his preface to the *Essay on the Independency of Scotland*.—‘In case, hereafter, I make any public appearance, it will probably be in relation to the formulas and styles of Scots writs, ancient and modern.’—It is indeed much to be regretted that our learned brother did not appear in print upon this subject. Had the knowledge of our styles and formulas been revived, even at that late period, it would undoubtedly ere now have reached all the perfection the subject was capable of.

It is a surprising, but a true circumstance, that our ancient deeds and records never have been consulted with an intention to understand either the laws or the forms of our country. It is to other causes that attention of any kind has been paid, either to them or to the antiquities of Scotland. Historians have sometimes had recourse to them for ascertaining disputed facts; genealogists have searched them for names to fill up their pedigrees; but it is chiefly to two or three national disputes that the public owes all the knowledge it is possessed of in these matters. The chief of these has been the question about homage, or the independency of the church and kingdom of Scotland upon those of England. This was seriously brought before the public by several English writers. They were answered by Sir Thomas Craig in his book upon Homage. The dispute was revived, as mentioned before, by Mr Atwood, in the beginning of this century; upon which Sir James Dalrymple, Mr Anderson, and several others, took the field against him; and to this we owe Sir James’s *Collections* concerning the Scottish History; Mr Anderson’s *Essay upon the Independency of this Kingdom*, and a number of learned and curious tracts, together with that capital work the *Diplomata Scotiae*.

The next of these matters, in point of importance, originated in politics; in the opinions of those parties which, from the Reformation.

tion downwards, divided this nation, viz. the Monarchical and Republican, which, at different periods, called forth the abilities of our great men, from Buchanan down to Lord Kaimes. The next grand contest which has exercised the abilities of our lawyers and antiquaries, is that concerning the authenticity of the *Regiam Majestatem*, and the laws of Malcolm M'Kenneth, published by Skene. These literary wars have brought to light, and stamped a value upon, a number of MSS. treatises, original deeds, records, and anecdotes, which would otherwise have been totally neglected, and perhaps unknown.

Lord Kaimes, to his immortal honour, was the first of our lawyers who pointed out the errors in the ordinary method of studying our law, and who conceived an idea of illustrating it by history, by manners, and by the forms of ancient deeds. Encouraged by his Lordship, Sir John Dalrymple, at an early period of life, published an Essay towards the General History of Feudal Property. After the example of Montesquieu's *Spirit of the Laws*, and the *Considerations upon Forfeiture*, written by the late Hon. Charles York, Sir John proposes to 'unite philosophy and history with jurisprudence, and 'to write upon law subjects like a scholar and a gentleman.' What is proposed has been performed. The arrangement of the subject is admirable; a great deal of learning is displayed, and a much greater share of ingenuity. It has therefore been well received, and valued by lawyers; but to practitioners and formalists the essay is not of equal importance. A history of feudal property, supported by theory alone; a history of entails, succession, and conveyancing, without a single form of entail, writ of descent, or conveyance, ancient or modern, cannot afford either much satisfaction or utility in practice. Where facts are not to be had, theory is allowable; the fancy may be suffered to indulge in the varied ingenuity of conjecture; but where facts are to be had, this is not admissible. A writer upon any science, but upon the law of a country in particular, must not frame his theory, and afterwards search for facts to support it. Let any
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person try the law works of Sir Francis Bacon, Sir Henry Spelman, Baron Gilbert, Judge Blackstone, and many others, he will probably find, that the deeper he goes, and the closer he inquires, the better satisfied he will be of the solid learning, and well weighed doctrine, of his author. The reason is, that the works of these men are founded upon the real history and actual progress of the laws and forms of their country. Every thing they advance is founded upon a fact; and that fact, together with the reasoning, placed before the reader. The same cannot be said of the History of Feudal Property, by Sir John Dalrymple; or of the Law Tracts, and less so of the Elucidations, published by Lord Kaims. In his Lordship's works are to be found strength and variety of expression, a luxuriant fancy, a mind rich in learning, endowed with a degree of ingenuity, which falls to the lot of very few men. It is that wonderful ingenuity to which, as often as his Lordship did go wrong, the error is to be imputed. A thought, a hint, an expression, a single inference, seems more than once to have given him a hypothesis, or the subject of a Tract, or an article of Elucidation; and the idea once conceived, his mode of supporting it is so ingenious, and so plausible, that, if the reader inquire no farther, he must, for the most part, remain convinced; and yet, we are sorry to say it, he will also very often remain in error. Although, by trusting to his own strength of reasoning, in place of deliberate inquiry, Lord Kaims has often gone wrong, yet, upon the whole, it would be the height of ingratitude not to acknowledge, that I have been more indebted to him for assistance and materials, than to all the other writers on our law.

We have now mentioned all the sources of public information which this country affords, upon the subject of the present undertaking: But it is on all hands agreed, that written charters and instruments were not the natural productions of Scotland. They were common among the Franks, Germans, and the Anglo-Saxons, at a period long before we are able to produce any vestige of their existence among ourselves. Our antiquaries, particularly the laborious
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and learned Mr Thomas Ruddiman, has taken pains to show, that we had the use of charters preceding the reign of Malcolm Canmore; yet the original of none has been produced earlier than that of Duncan II. his son, whose reign commenced in the year 1093; so that this charter may be dated about thirty years after the Norman conquest. Sir Thomas Craig gives it as his opinion, that we might have had something of the charter kind anterior to that period; yet, that the complete form of it came to us, with the language and customs of the English, in the reign of Malcolm Canmore. When we began to use the charter cannot be precisely ascertained; but it is certain that the forms found in Scotland were almost precisely of the like tenor with those of England at the same period; and those of England are very little different from what were used upon the Continent, and had been used ever since the conquest of the western empire by the northern barbarians. The forms, then, of charters, of instruments, and of deeds respecting land property, together with their technical terms, and every circumstance relating to them, are of the highest antiquity among the nations of Europe, and have suffered fewer changes than any usages or customs that can be instanced in the practice of mankind.

No branch of antiquities, no part of the usages of those times which succeeded the ruin of the Roman empire, and of that gloomy period which is known by the name of the *middle ages*, has been so much inquired into, illustrated, and explained, as the subject of deeds, charters, and instruments, public and private. Indeed, the learning, the labour, and the expence, which have been bestowed upon this subject by the literati upon the Continent, and in England, are absolutely astonishing; and what is more so, all of it has been occasioned by a literary dispute. This dispute gave rise to a new science, under the title of *La Diplomatique*, which came to be treated of in form. The Abbies, and monastic orders in France, and all over the Continent, vie with each other in point of antiquity and favour from the Sovereign. This they pretend to prove by ancient charters, and

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grants,

grants, from their respective Princes, or dignified clergymen. The generality of these grants respected land, and were produced in courts of justice, where their authenticity was of consequence called in question. The Monks of one order envying the pretensions of another, by whom they happened to be outdone in monuments of antiquity, took the natural part of decrying some of them as forgeries, and framing certain rules for the detection of impositions of that kind. These disputes lay among themselves for some time, without interesting the public. At last Father Mabillon, a Benedictine, a man possessed of the most extensive learning, and unconquerable assiduity, published, in the year 1681, a folio volume *De re Diplomatica*, in which he displayed a depth of knowledge and labour altogether unprecedented. He presented the republic of letters with a new art, scientifically treated: He published a great variety of ancient deeds, and instruments, of all kinds, collected from the libraries, archives, and repositories, in Italy, France, and Germany, together with every thing of that kind that had been formerly made public, either upon the Continent or in England. With these he gives a set of fixed rules to distinguish true deeds from false; and exemplifies them in the defence of a great many, which, upon account of their high antiquity, had been ignorantly attacked. This capital work made a great noise in the learned world, and justly raised the author very high in public estimation. He was immediately attacked by Father German, who contested a great part of his system, in which he was seconded by several others, while many literati joined Mabillon. The dispute grew hot, and spread itself to Italy, to Germany, and to England. Vast collections of deeds were made; and, in short, the knowledge of the form and style, the writing, the sealing, the subscription, the paper, and every circumstance, intrinsic and extrinsic, belonging to charters and instruments, became the fashionable learning of Europe for a considerable period. Among these writers, several Englishmen, particularly Dr Hicks, and Mr David Casley, librarian to
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George II. made a distinguished figure. Upon the whole, the supporters of the deeds, taking part with Mabillon, were supposed to have beat the diplomatic sceptics out of the field. About fifty years afterwards, viz. in 1742, the old dispute was revived in France, upon some few grounds which had the appearance of novelty. Upon this occasion the old cause, that is, the side of Antiquity and Mabillon, was defended by two of his successors, the Fathers Toussin and Tassin, Benedictines of the congregation of St Maure. These men, to the knowledge afforded them by former diplomatic authors, made additions of their own, which at once pleased and surprised the learned world. These Benedictines have searched every where, and left nothing undone to ascertain the formulas and solemnities of deeds, grants, and instruments, public and private, extrinsic and intrinsic, as used in the several countries of Europe, from the Christian aera to their own times, arranging the whole in the natural order of time. This capital work silenced effectually the whole tribe of modern sceptics, not one of whom have since ventured to put pen to paper upon the subject *.

Not one of the great contests we have mentioned, or the inquiries set on foot in consequence of them, had the history of the law of any particular country, or the progress of the manners of mankind, in view ; but they necessarily have brought a great deal of learning, and of materials, into light ; materials of the greatest use to any person engaged in those pursuits. It is from these sources we have endeavoured to draw the information necessary to the present subject. The lawyers and antiquaries of England alone have expressly dedicated their labours and their collections to the illustration of the laws, the forms, and the manners, of their country. In the invaluable works of these men, we have also found the most immediate and direct assistance.

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* Published at Paris in 1762, in six volumes quarto, under the title "*Nouveau Traité du Diplomatique.*"

In the course of the following prelections, it will, perhaps, sometimes be thought that we go too far back. It is presumed, however, that it is impossible to commit an error in setting out from the most early period. It will be pleasing and surprising to discover, that the styles, forms, and ceremonies, regarding property, are, in one sense, the most perfect monuments of antiquity presently existing. We shall find, that, through the revolutions of manners, of laws, and of nations, these things have been faithfully preserved, and handed down from generation to generation, with less change, and fewer alterations, than any other branch of human usages; and while thousands of monuments of stone and metal, by which mankind designed to perpetuate themselves and their actions, have crumbled into dust, the frail materials of deeds and instruments, parchment and paper, have outlived them all. If we attempt to trace backward upon the laws, the manners, and the customs, of our ancestors, we shall find that we are using the wrong end of the glass: We shall perceive every thing in a false light: We shall adopt wrong principles, draw erroneous conclusions, and wonder at things which ought to create no surprise. On the contrary, if we are able to reach the source of a practice, or the beginning of a form, we may trace it forward with safety. Whatever variation appears in the course of its progress, we shall perceive with ease the reason of that change, undisturbed by the surprise and confusion of idea which its appearance must otherwise have occasioned.

If we begin, for example, with the horrible law of the twelve tables at Rome, which directed the body of an insolvent debtor to be cut in pieces, and divided among his creditors, the mind is thereby prepared to receive the consequent imprisonments, chains, and severities, which creditors were allowed to inflict upon their unfortunate fellow citizens who owed them money. To deprive their debtors of their liberty, to sell them for slaves, and to divide the price, appears in the light of merciful dealing, to a people who could calmly look upon that part of the twelve tables set up in their forum.

rum. After tracing the progress of the severities inflicted upon Roman debtors, with what satisfaction do we find them terminate in the *cessio bonorum*? It is plain, that, were we to begin at the nearest point, or to go no farther, the pleasure and instruction would be in a great measure lost; for, to a person who has no other idea but what a polished society gives him, there is nothing in the *cessio bonorum* which does not seem reasonable and necessary.

No feature in the manners of our ancestors appears more barbarous than the custom of estimating crimes and offences of all kinds at fixed rates, in money or cattle, and the specialties to which these rules descend, bordering in most countries upon ridicule: But, when we go to the original of the matter, when we read in Tacitus, that it was the established custom among the Germans for a whole race or kindred to revenge an injury done to an individual, we cannot but applaud the custom, which combated one passion by another less dangerous—which tended to extinguish revenge, by gratifying avarice. In the same manner, the determination of a cause by single combat of the parties, or champions for them, would, of itself, surprise us with the excess of its absurdity: But, if we had learned before, that this custom came to be tolerated in lieu of another almost subversive of society, and in itself, if possible, more absurd; when we learn, that the single combat was originally admitted to gratify people of rank, to whom money or cattle were no bribe, or to prevent the combat between the whole race of such parties and their friends, the absurdity changes into wisdom. Every thing was wise that could prevent or lessen the horrible usage to which all the northern nations were addicted, of revenging injuries by private war. In comparison to these manners, the single combat was a prodigious improvement upon society. Accordingly we shall find, that it was only judicially admitted in the same cases, that if not terminated in that manner, it gave the parties a right to make private war upon each other.

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It is unnecessary, at present, to give more instances. We shall often meet with them in the course of our progress, which will relieve the natural sterility of our subject, by now and then affording a view of such of our national manners and customs as are intimately connected with the forms and styles used in the practice of the law of this country.

History

History of the Feudal Law.

AS it is our wish to connect the account of our employment with real history and manners, we intend not to introduce the present *history of the feudal law* with any of those sentences of general declamation which are to be found in our law books respecting it, and the nations among whom we are told it had its birth. It is easy to say, that the Roman empire was invaded by swarms of barbarians from the north; and that these, after subjugating the countries of western Europe, divided the lands among themselves, to be held of their leaders for military service. These positions are general, and unsatisfactory. They give no idea of the people, or their manners. They comprehend in a sentence the period of many hundred years, and are not agreeable to history or to truth. The vantage ground, from which our subject can alone be properly viewed, is, without doubt, that extraordinary system of jurisprudence which arose among the northern nations who dismembered the Roman empire. This was no other than the proper customs of those barbarians in their original seats, which, after their conquest of the western empire, grew by degrees into a system, and at last came to be almost universally acknowledged, under the title of the *Feodal Law*.

To such gentlemen as are employed in the particular study of this law, the history of it to be now given will not, perhaps, yield much information. It is designed for those, whose time and opportunities will not afford that advantage. It is also intended to shorten the subsequent

frequent discourses, by preventing the necessity of the numerous digressions and allusions to that history, which it would otherwise be necessary to make in our future disquisitions.

Happily for this branch of necessary knowledge, the sources of it have been laid open by the greatest men of antiquity. The conquest of Gaul by Julius Caesar, necessarily led him to describe the manners of the people; and the elegant Tacitus has dedicated a complete treatise to the manners of the Germans. His father-in-law, the virtuous Agricola, was employed in those conquests, and penetrated even to the Grampian mountains of Scotland. To the lust of dominion, and the unnecessary destruction of those northern people, it is, that we owe the discovery of the very manners and customs, which, in process of time, proved the ruin of the conquerors, which buried their laws in oblivion, and gave rise to a new system, by which the nations of modern Europe continue at this moment to be influenced.

The laws and customs of the northern conquerors were, after their establishment, collected under various titles. In general, they are termed *the Barbarian Codes*. ‘Caesar and Tacitus, (says Baron Montelquieu) in their description of the Gauls and Germans, agree so precisely with the codes of the laws of those barbarous people, which yet remain, that, in reading these authors, we every where find the codes; and in reading the codes, Caesar and Tacitus every where appear.’

Caesar subdued Gaul about fifty-seven years before the Christian æra; and Tacitus flourished in the reigns of Vespasian, Domitian, and Nerva, near one hundred years after that period. Their account of the Gauls and Germans coincide in every circumstance. Caesar relates, ‘that the great men among them had many attendants, who followed them to war, in their language termed *soldurii*; that these people shared the good and bad fortune of their chiefs, even to death itself*.’ Their Princes or commanders were chosen from
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* De Bello Gallico, lib. 4. c. 22.

personal merit; and they were of consequence attended by the flower of the nation. Tacitus has described the constitution with elegant perspicuity. He says, 'This is their principal state, their chief strength, to be at all times surrounded with a numerous band of chosen young men, for ornament and glory in peace, for security and defence in war; nor is it among his own people only, but also from the neighbouring communities, that a Prince reaps high honour and great renown, when he surpasses in the number and magnanimity of his followers. Such are courted by embassies, and distinguished with presents; and by the terror of their fame alone, often dissipate wars. In the day of battle, it is scandalous for the Prince to be surpassed in feats of bravery; scandalous to the followers to fail in matching the valour of the Prince: But it is infamy during life, and an indelible reproach, to return alive from a battle where their Prince was slain. To preserve him, to defend him, and to ascribe to his glory all their gallant actions, is the sum, and most sacred part of their oath: For from the liberality of their Prince, they demand and enjoy the war horse, and that terrible javelin dyed in the blood of their enemies. Instead of pay, they are supplied with a daily table, and repasts, though grossly prepared, yet very profuse. For maintaining such liberality and munificence, a fund is furnished by continual wars and plunder *.'

The state of land among these people stood thus: The property belonged to the tribe or nation, and the use of it to individuals. But particular possessions were not allowed. An annual division took place among the people, regulated by their Prince and chief men. The part of the nation or community which was destined to cultivate the lands, supported the other part that went to war; and they alternately relieved each other. Each portion of land fell thus to be cultivated by a different hand; and every one of the nation had their share of its defence, and of the spoil of their enemies. Thus were

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* De Mor. Germ. c. 13. et 14.

the wild pleasures, both of wandering and of war, rendered compatible with local territory. The dependence of the body of the nation upon their chief men, was maintained by the constant power of distribution of the booty and the lands exercised by the latter; the extent of their country being sufficient to admit such a constant change: 'Agri' (says Tacitus) *pro numero cultorum ab universis per vices occupantur, quos mox inter se secundum dignationem partuntur; facilitatem partiendi camporum spatia praestant* *.' The reasons given by Caesar for this northern system of manners, so opposite to those of the other ancient nations with whom we are acquainted, are these, viz. the principle of their government, and the purpose of society, tended principally to war; they dreaded that the habit of agriculture would be hurtful to that disposition; for the same reason, they were afraid of the attachment of the people to any particular spot: They were afraid lest individuals should think of extending their possessions, of building with a view to duration and comfort, and consequently of enervating their bodies by the exclusion of cold and heat: And, lastly, they feared lest the love of money should introduce its concomitant evils, and distinctions be established by riches alone, independent of martial virtue †. Such are the motives to which Caesar ascribes the manners he observed among those warlike nations; but we are not to conceive that the customs and oeconomy of any one people were originally founded on political reasons; they arose from the combinations of climate, of site, and of accidents, which pass away; they are confirmed by habit, assume the appearance of being natural, and are afterwards only modelled or confirmed by political considerations. Every nation, either of the ancient or modern world, differs from another in manners and institutions; and each of them will defend their own by political reasonings.

The domestic government among the people we are treating of was thus arranged: The King, or Prince, judged the immediate dependants

* De Mor. Germ. c. 26.

† Lib. 6. c. 22.

difference subsisted between the condition of these people among the northern nations, and those of the same rank in the south. 'Among the Germans (says Sir Thomas Craig) servitude stood upon a liberal footing. They can only be said to have made servants of men, where other nations made them slaves *.' Another reason assigned by Tacitus for this mildness, was an astonishing rage for gaming among the people he describes. It was not, it seems, uncommon for a German or a Gaul, after losing every thing he had, to stake his liberty upon the last throw of the dice. The loser, though superior in bodily strength to his adversary, calmly yielded himself to be bound, and his future service to be sold. This, with them, was the point of honour. 'Ipsi fidem vocant,' is the pointed remark of the noble historian. As this spirit was fashionable, few men could promise themselves security from the like fate some time or other; and hence all severity upon people in that station must naturally have been prevented †.

Besides the slaves, their property, of a moveable nature, consisted solely in arms, a few utensils, and cattle. They knew little or nothing of the use of gold and silver; and, consequently, nothing which deserved the name of commerce could subsist among them. Of testaments or latter wills they had no idea: Nature dictated that a man should be succeeded by his own children, and, failing them, by his nearest of kin. The males next in degree drew equal shares: The women had a small portion of arms for their dowry, to signify (as Tacitus informs us) that they were to share with their husbands in all his fortunes: Accordingly, they attended the army in the field,

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* Craig, page 24.

† This authority from Tacitus is much insisted on by the writers on this subject, and therefore I shall quote it verbatim. 'Caeteris servis non in nostrum morem descriptis per familiam ministeriis utuntur. Suum quisque sedem suos penates regit. Frumenti modum dominus, aut pecoris, aut vestis, ut colono, injungit et servus haecenus paret. Verberare servum, ac vinculis et opere coercere rarum; occidere solent, non disciplina et severitate sed impetu et ira ut inimicum.'

witnessed the valour of their relations, and animated them to the combat. Immoveable property they had none; it was vested in the community. In the intervals of peace, like the American tribes, they indulged in sloth, or exercised themselves in the chase, which is justly termed *the image of war*.

It is a common observation with the authors of antiquity, that the inhabitants of Gaul, Germany, Spain, and Britain, bore an obvious resemblance to each other in their persons, laws, and manners. They went under the general title of *Celtae*, and from every circumstance appear to have been the same people. In process of time, and from the different countries and situations, it behoved them to differ; but to strangers, the original resemblance continued through ages. Caesar takes notice, that the Britons who lived nearest to Gaul, seemed to be a colony of the Gauls. Tacitus makes an observation of the same kind; and adds, that the northern Britons seemed, in their persons, to resemble the Germans more than the Gauls. In short, it may be concluded, that the inhabitants of the whole western provinces of Europe were filled with the same race of people.

The Gauls had, several times before the establishment of the empire, proved dangerous enemies to Rome. In latter times, it required a Marius to repel the Cimbri and the Teutones, who showed what the Romans had to expect when their martial virtues and discipline should come to decline. For some time after the age of Tacitus, these Celtic nations alone served to keep the Roman legions in the exercise of arms; but the empire itself was now tending inevitably to destruction. The barbarians marked the change, and began to revenge themselves, by successful and dangerous incursions into the imperial territories. It is not our purpose to descend to particulars. The subject has been treated of by a variety of modern and fashionable authors: We shall only observe, that the enterprises of the barbarians were sometimes checked by the valour and conduct of particular men, at different times, who may be termed *the last of the Romans*. Sometimes the barbarians were bought off with money;
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sometimes employed against one another; and, as the last resource of debile policy, they were allowed to establish themselves within the limits of the empire, in order to shield it from succeeding incursions; a measure which announced the ruin of the Roman name. These struggles and irruptions, which began in the end of the second century, continued with increasing force for above a hundred years; during which, the vast countries which went under the name of Scythia seemed to teem with the human species, and every thing threatened old Rome with destruction. At last, in the year 404, during the weak reign of the young Arcadius, the Goths and Huns, formerly enemies, united, and poured their armies into Italy, headed by the terrible Alaric; after whom came Attila, termed *the scourge of God*. The Romans had robbed the world; the barbarians now robbed and murdered the Romans. This dreadful Scythian, created for the purpose of devastation, reduced the north of Europe, traversed the empire in quality of conqueror, or rather destroyer, and expired meditating the invasion of Africa. In this period of human misery, one hoard of barbarians had no sooner destroyed a region, and were about to settle in it, than another treated them in the very same manner; nor did war and ruin cease, till mankind grew thin by destruction.

We shall shortly mention the different races to whom the several regions of Europe were at last abandoned. The Lombards, or Longobards, a people from that part of Germany which is now the Bishopric of Magdeburgh and Halberstade, took final possession of Italy in the year 568. The Goths possessed themselves of Spain and Gaul. They consisted of two capital tribes, under the title of *Wisigoths*, or *Western Goths*, and *Ostrogoths*, or *Eastern Goths*; but after them came the Franks, under Maerovaeus, who founded the first race of the Kings of France, termed *Merovingian*; and by his son Clovis, the greatest part of Gaul was conquered. Clovis divided his kingdom among his sons, who were weak Princes; and the whole country was of course involved in civil war. Charles Martel, mayor of the
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the palace, anno 751, seized the sovereignty of France, and left it to his son Pepin, who was the founder of the second race of French Kings. He was succeeded by Charles the Great, who attacked the Lombards in Italy, anno 774, was afterwards crowned at Rome, and once more raised up an empire in the west. From him the second race of the Kings of France was termed *Carlovingian*.

In this wreck of empires, a difference of great moment appeared in the conduct of the western barbarians in the use of their conquests. The Huns and Tartars, issuing from the north-east, accustomed to live under the absolute dominion of one Prince, had nothing in view but plunder, and the extension of their tyrant's dominion. The Goths, on the contrary, and other nations of the north-west, spared, in a great degree, the inhabitants of the conquered countries, and preserved even their rights. In some instances they adopted their laws and customs, and mixed them with their own. One great feature of polity distinguished all their establishments; it was the limitation of the powers of their Kings and chief men. The liberty of individuals, and the good of the whole, seemed to be the leading principles of their various government. Upon this account, Baron Montesquieu observes, that the north, instead of being the *officina gentium*, i. e. *the work shop, or manufacture of nations*, the name bestowed upon it by Pliny, and other writers, should be called *the manufacture of instruments*, which broke the chains forged in the south; for thence issued those valiant nations, the destroyers of tyrants and slaves, who taught mankind that Nature had made them equal; and that, when reason required them to be dependent, that dependence was for their own proper benefit. These manners and principles were not new; they had for ages governed the conduct of those wild nations while in their woods; they were carried by them into the countries of their conquest; and there, under a wider range, they produced that system of jurisprudence and policy by which all the nations of modern Europe were once governed, and
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by which their laws and their forms continue at this moment to be influenced.

The barbarians, in their settlements, did not, according to the vulgar notion, extirpate the inhabitants they found before them, or strip them of their whole property. On the contrary, they united themselves with the Romans and provincials, and contented themselves with a part of the riches, *i. e.* both of the lands, the slaves, and the cattle; and, what is still more singular, they allowed the conquered nations to continue under the government of the Roman laws.

Each nation, or tribe of conquerors, carried with them, however, a set of rules peculiar to themselves. The resemblance of these to each other gives proof of the different people having been originally the same. The Franks brought with them the Salic laws, which were afterwards put in writing. The Ripuarians had their peculiar usages, which were also collected, and reduced to writing, by Theoderick, King of Austrasia, about the end of the fifth century. The Wisigoths and the Lombards also reduced their usages to writing; and all these collections now remain. They are called *the Barbarian Codes*; and are consulted for the original laws and customs of the conquerors of Europe. It is of these codes that, as formerly observed, Montesquieu speaks, as reflecting the very manners, principles, and customs, which Caesar and Tacitus ascribe to the Gauls and Germans in their time.

In the reign of Charles the Great, or the end of the eighth century, the period of history at which we stopped, the general system, which we term *Feodal*, had made considerable advances to an universal establishment over all the nations of the new empire; for the singularity of the proper laws of the barbarians consisted in this, that all of them were personal, and quite independent of territory. The Frank was judged by his own laws; the Lombard by his code; and the provincial Romans by their own. So far from attempting to render their several systems uniform among themselves, they wished not to impose their laws even upon the people they had conquered.

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In this condition matters could not long remain; the new situation in which these nations found themselves placed necessarily required new regulations; and thence, amidst confusion, the law of the fiefs grew by degrees common to them all.

It is not meant in this discourse to touch upon the much controverted origin of this famous system. Some discover it in the early connection of the Roman *patroni et clientes*; others in the higher dependance, or *clientela*, of the same people, where provinces put themselves under the protection of the great Patricians, and which some time subsisted between cities and villages, where military service was paid for protection, and in the *beneficia* which were allowed by the Roman Emperors for the defence of the frontiers. Without seeking farther, we may be satisfied that the feudal laws were the natural consequence of the original manners, and the new situation into which the conquerors of Europe were thrown. The old Germans had no property in the land; that property was vested in the community; the possession was divided by the chiefs among the people, and lasted no longer than one year. Though this polity might be suited to their wandering situation in their native woods, it did not answer the condition of the people established in a new territory, and enjoying it in ease and quiet; yet was this most inconvenient part of their customs very much adhered to. The books of the feus, written hundreds of years after the period we are talking of, declare, that the first grants of the land made by the chiefs to the people were for one year, and then for more; or, as the feudal writers understood, they continued to be possessed at the will of the Lord. This Sir Thomas Craig terms *the infancy of feus*; and he is copied by the English writers, who deduce their tenancy by sufferance from the same source.

The companions or comites of the German Princes, were bound to attendance on him during life, and gave an oath of fidelity for that purpose; and it is conjectured that they first obtained their grants for life. They were judges of the several districts of the na-

tion, and entitled to certain profits of their courts for the support of their dignity; and hence our Counts and counties are said to be derived. Their example was followed by the freemen under them; and estates for life went on increasing in number from the year 600, downwards to the reign of Charlemagne, in the end of the eighth century. During this period, a number of causes contributed to extend and establish the right of the tenant. The wandering life of the conquerors was exchanged for fixed dwellings; they built houses of more strength and convenience than their ancestors had been accustomed to, and habit attached them to the spot. They had suffered the provincial Romans to be possessed of a great part of the lands upon the footing of their own law, *i. e.* in absolute property and independence. These estates, in contradistinction to the fiefs of the barbarians, were called *allodial*; a term of very doubtful etymology. The example, however, of these independent possessions, which went to the heirs of the proprietor, could not fail to create a wish that the fief should also remain with the heir of the tenant: But this did not happen till the beginning of the 9th century, in the reign of Charles the Great, when the grant went no further than to the tenant, and his immediate descendants, or the children of his body, all of whom succeeded equally, unless one was particularly pointed out, and there the grant stopped. Craig therefore terms the period between 650 and 800, when lands were held only in life, or descended to the children of the tenant, *the childhood of feus*.

Under Charlemagne, feus, we are told, began, properly speaking, to be hereditary, *i. e.* descended to the grand-children of the tenant in a right line, though not established by any express law. That great Prince emulated the old empire in the extent of his dominions, and divided the conquest among his soldiers with this additional privilege. His successors followed this example in the extension of feus, as appears from a constitution of Lotharius, his grandchild. After the extinction of the Carlovingian race, we have the authority of the Books of the Feus, that Conrad, the Emperor, in order to encourage

courage the soldiers of an army he was leading into Italy, renewed the constitution of Lotharius. By this time, the divisions between the Popes and the Emperors, so fatal to Italy, and which lasted so long, had begun. These perpetual wars forced the Princes of Europe to relax the original severity of land tenures, and to court the attachment of military men. Feus (says Craig) in this manner arrived at their *manhood*. 'This we ascribe (continues he) to Conrad the Emperor, who decreed, that benefices should descend not only to great-grandchildren, but that one brother should succeed another dying without children, in that feu which had belonged to the common father *.' When grants were in their first precarious state, *i. e.* dependent on the will of the Lord, they were termed *munera*; when for life, or a term of years, they became *beneficia*; and when, afterwards they attained to manhood, *i. e.* hereditary, the appellation of *feuda* came into common use.

In the reign of Charlemagne, the chiefs or leaders of the different tribes were chosen by the Sovereign; and in them, both the civil and military powers united. Within their district they administered justice, and commanded the armies in the field, from whence the greatest of them came to be termed *Duces*, or *Dukes*, in imitation of a high officer of the same name, common among the Romans of the lower empire. Each of these great judges had a deputy under him, called a *Viccomes*, *Viguier*, or *Viscount*, who, in the administration of his office, was assisted by a number of assessors instructed in the laws, called *Scabini*; and every court had its clerk, or *notarius*. In order to check the abuse of power, or the negligence of these judges, the King, from time to time, gave a special commission to a certain number of his courtiers, attending upon his person, to traverse the kingdom, to examine the conduct of the territorial judges, and to redress the wrongs committed by them. The great division of the people was, properly speaking, that of *freemen* and *slaves*. The freemen

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consisted

* P. 28. § 8.

consisted of the ancient inhabitants of the country Gauls and Romans, to whom their liberty, and part of their property, had been left, under the title of *allodial lands*. The other freemen consisted of the Franks, Salians, Ripuarians, &c. the conquerors of the former, who lived under their own laws, and possessed the fiscal lands, or the *beneficia*, under their Princes or chiefs, and who were bound to military service in respect of their benefices. At first, we have heard, these *beneficia*, like the lands of the Germans mentioned by Tacitus, were revocable at the will of the Prince. The great men, to whose portion large tracks of land fell, granted benefices to the people under themselves upon the same precarious terms. Charles the Great, first among the Franks, established the descent of benefices in one degree; and his successors continued the practice upon different principles. The new empire, in their hands, fell to pieces; discord and anarchy every where prevailed: The degenerate Carlovingian Princes were obliged to court the favour, and consequently to suffer the usurpations, of their powerful subjects. The favourite point was the descent of the land to the heirs of proprietors, and the jurisdiction over the occupiers of that land. The Carlovingian race ended in Lewis V. about the year 986, when the kingdom was usurped by Hugh Capet, who founded the third race of the French Monarchs, after him called *the Capetian Line*. In order to fortify his usurpation, this Prince granted new concessions, for the further establishment of the property of lands; so that, in the time of Conrad III, in the year 1138, the whole lands of France were in a manner become fiefs; and we have heard that Conrad authorised their final establishment in Germany.

It was during the confusion and ignorance of those ages, that the church rose to that prodigious height of power and of prosperity, which has been the wonder of later times. Nine-tenths of the ancient formulas, charters, and writs, of those remote ages which have been preserved, consist of donations, privileges, exemptions, and grants of land, to the church, which seems to have watched every opportunity

opportunity of aggrandizing itself by the follies and weaknesses of mankind. It was mentioned, that the jurisdiction and civil government, under Charlemagne and his predecessors, were committed to the several Dukes, Counts, and other great officers of the crown, whose connection with the lands depended principally upon their judicative powers; and though grants were made, to churches and monasteries, of lands, yet the King's judges continued to exercise the common jurisdiction over them. From several deeds yet preserved, of the first and second race of the French Princes, it appears, that the churchmen procured exemption of a great part of their lands from the royal and all secular jurisdiction; and in these exemptions the learned men of the Continent think that they discover the true origin of the seigneurial powers, or, as we say, of *the territorial jurisdiction of the feudal Lords*. It being once found out that exemptions of this kind were compatible with public government, the same request came to be made by laics. Accordingly, a charter is preserved in the Archbishopric of Narbonne, dated in the year 811, whereby Lewis le Debonnaire, the son of Charles the Great, gives to a laic Lord the lands of Villare Fontes, with power to administer justice, civil and criminal, within its bounds, and discharging all the judges ordinary from interrupting him in the exercise of that right. Grants of the same kind continued to increase, till at last, in the tenth century, under the degenerate successors of Charlemagne, the Dukes, Counts, and great officers of the crown of France, renounced all dependence upon their Sovereign, and erected the territories over which, originally, they had no more than civil jurisdiction, into separate principalities, acknowledging no further dependence upon the crown than that of receiving from it the investitures of their dominions, which was no more than a ceremonial mark of dependence; for, in other respects, those great men arrogated to themselves all the powers of royalty within their proper territories: They gave grants of land, in order to establish vassals under themselves, upon condition of homage to their persons, of military services, and of aids for the
support

support of their dignity. The conduct of the Prince was imitated by each vassal within the extent of his own grant; and thus the proper feudal dependence came to be established in the north of Europe, particularly in France, Italy, and Germany. So soon as the fiefs had thus become hereditary, differences of various kinds arose between superior and vassal, respecting the nature of their rights and services. In order to regulate these matters, rules and customs were established at different times; and these being at last collected into a body, as mentioned, were termed *the Laws of the Fiefs*, or *Consuetudines Feudorum*, about the middle of the twelfth century. These laws of the fiefs, having the advantage of being reduced into a regular code, came to be studied in the schools of law afterwards established in Europe, and thence acquired a kind of universal authority. At the same time, it is necessary to observe, that they never were wholly adopted in any one country in Europe. As we have been told by Craig, and other writers on the subject, they certainly regarded the customs of the Lombards more than of any other people. These customs survived the nation itself; for the kingdom of the Lombards had been destroyed by Charlemagne near two hundred years before the feudal laws were committed to writing. In the mean time, each nation, and almost every province, had particular customs proper to itself: So that, when the feudal written laws came afterwards to prevail, they were only received in so far as they happened to be consistent with the established customs of each nation: And hence that variety of laws and consuetudes which took place in Europe, and still continues to distinguish the several nations who have succeeded the destroyers of the Roman people.

The invaders of the western empire mixed with the Roman inhabitants of Gaul, Spain, and Lombardy; and, upon their conversion to Christianity, their priests and principal men learned the language of the conquered. Their Princes arrogated the state and titles of the ancient Emperors; and even the sacred name of Consul, Patrician, and other dignified Roman appellations, were kept up for centuries

centuries in the west. So far, too, as their own particular customs did not forbid, they submitted, by degrees, even to the Roman laws. By these we are to understand at that time the Roman laws, as compiled and published by Theodosius the younger. It consisted of the constitutions of the Christian Emperors, from Constantine to Theodosius himself, which were published in the year 438, declared to be the only rule of judgment in the empire, and all other laws abrogated. These laws spread over all Europe at that time, and continued till the year 508, when Alaric, the second King of the Visigoths in Spain, published another body of laws under his own name, principally taken from those of Theodosius. By these the Romans of the western empire, who lived among the Franks and other barbarians, were governed, and in some degree the barbarians themselves.

At last, the code of the civil law was promulgated by Justinian, who held the empire in the east, in the 529, and completed in the 533. It is said, that, upon this publication, all former laws vanished: Others, with equal probability, suppose, that the Theodosian code, first established in the west, kept its ground. One point is certain, that, notwithstanding the prodigious pains taken by Justinian, his works soon sunk into neglect. His successors of the east published new collections of their own; and, in the west, it fell into entire oblivion.

The northern provinces of France, upon which the fury of the first irruptions fell, seem to have been occupied by the barbarians in a much greater proportion than the south; consequently, the proper customs of these people seemed, for some time, entirely to prevail. Such were the laws of the Salians, Ripuarians, Burgundians, Bavarians, and others. Each tribe, as before noticed, continued to be governed by their own rules, which, though different in particular cases, were evidently of the same spirit, and plainly indicated the whole to have been of the same original: But, as cases occurred, unprovided for by these laws, it behoved them to have recourse to
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the Roman jurisprudence, which they found among the inhabitants of the country. It was that law, in particular, which alone afforded the forms of deeds, of bargain and sale, of gifts and transmissions of property. Property was then, as before observed, divided into beneficiary and allodial; the allodial was, without doubt, that share of the lands left to the old Roman inhabitants. It continued in the ancient situation, that is, independent of any superior, and descendable to heirs. The forms of transmission, and of descent of allodial lands, were in a manner purely Roman; and the barbarians brought no forms to substitute in their place. The public edicts, deeds, and grants, of the Kings of the Franks, were entirely modelled according to these forms; and so soon as the church began to acquire property in land, she made use of the same kind of learning. The forms, it is true, degenerated with increasing ignorance and confusion. The Latin grew every day more corrupt; as it behoved the Roman language to stoop to the expression of customs and ideas abhorrent to its genius and principles. It was forced to convey the unnatural sounds of feus, of vassalage, of services, of judiciary duels, and of the consuetudes of barbarians, who had for ages been the objects of Roman contempt; and this is the genuine source of what we term the *Law Latin* at this moment.

The knowledge both of the Roman language, and of the Roman laws, such as then existed, was encouraged and revived by Charles the Great. He also had the laws of the Franks, and others whom we call *barbarians*, reduced into form, adding to them constitutions of his own: But the disorders which took place among his successors, and the total revolution which happened upon their extinction, threw every thing back into confusion. After the great officers of the crown, by the divisions of the empire, and the ruin of the royal authority, had seized upon the countries and the free cities, of which they were no more than administrators, and erected them into principalities, and even sovereignties, each of these new Potentates wished to have a code of laws for their proper subjects. These laws could

could not be of new invention; they were a mixture of all those that have been mentioned, taken from the actual customs found among the inhabitants of each province at the time; and this is the reason to which history imputes the variety of customs in the kingdom of France. Each province had its proper rules, which were afterwards separately collected, and reduced into form; and hence the customs of Paris, the customs of Normandy, the customs of Artois, and others. Though the ancient inhabitants were not wholly stripped of their property or their laws, yet were they, for a considerable time, subjected to very humiliating distinctions. It was long before they were entrusted with arms, and, consequently, were not members of the state. Injuries of every kind, among the conquerors, were compensated by money or goods. If a Roman injured a Frank, he paid the full sum; but if the Frank injured the Roman, he paid only the half. A slight accusation served to condemn the one to the ordeal, or the trial by fire and water, which the other was not obliged to undergo but for murder alone. The ancient inhabitants, then, it appears, paid very dear for the allodality of their lands; and, therefore, it was no wonder that they wished to convert them into feudal tenures, or, in other words, to become Franks to all intents and purposes. The permanency of the allodial tenure held out to the beneficiary tenants the advantage of fixed hereditary possession, and was doubtless a very great spur to the progress of the fief. So soon as the fief became permanent, the allodial tenant could not but wish to become a vassal; he therefore put himself under the protection of the King, Prince, or Lord, of his province, receiving from him a new grant, under the condition of fealty and service. All these causes tended to produce a new polity, unknown in the world before, the particular rules of which appeared in the year 1050; and, though the Books of the Feus were the work of private men, bearing to be promulgated by no authority, they soon came to be universally appealed to in all contests upon those subjects.

The Roman law, we are told, sunk almost into oblivion with the works of Justinian; and the restoration of it is attributed to the Emperor Lotharius; who, having marched to the assistance of the Pope about the year 1130, was assisted by the Pisans, and the town of Amalfi, in the kingdom of Naples, was taken by storm. A book was found among the plunder, which had lain in the dust, and to which the soldiers paid attention only upon account of the colours of its cover. This was the Digest of Justinian, which had either been placed there by that Emperor, or brought thence from Constantinople. Doubts, however, have been thrown by late writers upon the story of Amalfi. They hold the recovery of Justinian's MS. to have been earlier; because maxims and forms of the Justinian law are found in European monuments anterior to that period, which is certainly true; and it follows, either that Justinian's works have been recovered and studied at an earlier period, or that they had not been so much forgotten as we are taught to imagine. Thus, near about the same time, viz. the middle of the twelfth century, both the Roman and the feudal jurisprudence came to be promulgated as the general laws of Europe; the latter in the rights of land; the Roman in all other civil business, public and private. Both these systems, however, were, in many instances, made to yield to the particular usages of the different countries, now collected by antiquaries under the title of *the Barbarian Codes*.

Having now gone through the history of the jurisprudence of the Continent, we come to that of the people to whom this island owes her manners, her language, and her laws. The barbarians who inhabited the northern coasts of Germany went under the name of *Saxons*, a fierce nation, living by rapine and piracy: To them the Britons sent for aid against the Caledonians in the fifth century, after the Romans had retired from the south part of the island, and left them to their own defence. They consisted of several tribes, under the names of *Angles* and *Jutes*; though the Romans, to whom they were known by plundering the sea coasts, gave them the general

ral name of *Saxons*. The aid fatally solicited by the Britons arrived, under the conduct of two dreadful leaders, Hengist and Horfa. They repelled the Scots and Picts, the enemies of South Britain; but they became fond of the country, and did not choose to conquer for others. After driving the Britons ultimately into Wales, they seized the best part of the kingdom, and, followed by reinforcements of their countrymen, founded the kingdom of the Anglo Saxons. It is not the civil history of these people that comes under our province. We are no farther to take notice of it, than is necessary towards the understanding of such of their laws and customs as are relative to our own. We in the north of the island, though said to be derived from a different race of more ancient inhabitants, yet, so far as our history or our monuments reach, find ourselves speaking the very same language, acting under the influence of manners exactly similar, and, as we shall afterwards find, governed by the very same laws. Historians and antiquaries have displayed much ingenuity and learning in endeavouring to account for these extraordinary circumstances in two nations, who were so long separated from, and hostile to each other.

Historians assure us that the best part of Scotland, that is the lands between the Clyde and the Forth, during the Roman dominion over this island, formed a part of the province of Valencia: That, after the retreat of the Scots and Picts before the united Saxons and Britons, another army of Saxon adventurers landed here, under the conduct of two brothers, Octo and Ebeffa; and, upon establishment of the Saxon Heptarchy, this country made a part of the northern kingdom of Northumberland, or Bernicia. We are next told that the Scots and Picts, who surrounded this Saxon kingdom upon all hands, reduced it several times under their dominion; but rather mixed with the old inhabitants, and adopted their manners, than drove them out. The kingdoms of the Heptarchy were finally united, either by conquest or succession, in the person of Egbert, who thereby became the first King of all England; and the Picts were conquered by Ken-

neth King of Scots, who took possession of their country; so that, from this time, the whole island, Wales excepted, was divided between the two nations of England and Scotland. About the same period, a new and foreign enemy appeared. Different parts of Britain, but England in particular, were invaded by the Danes, who intollerably harassed them. To unite the Scots in the common cause of defence, either Edgar or Edwy, Kings of England in the twelfth century, ceded the Saxon country, lying between the Forth and the Tweed, to Indulphus King of Scotland; to which the counties of Northumberland, Cumberland, and Westmoreland, were afterwards added: And hence the Saxon language, and the Saxon manners, preserved themselves in this country, and were adopted by the Scots themselves, in the after reign of Malcolm Canmore.

The account now given from our historic antiquaries is extremely plausible, when supported by the certain testimony of the fact: For in this manner, or by similar causes, it can alone be accounted for, that the small kingdom of Scotland should have contained two races of people, so much divided by language and by manners, as to appear of different origin. The distinction of the Welsh from the English, can be historically traced: They are the ancient Britons, driven out by the Anglo Saxons. The Scots were the conquerors of this country; and yet the Saxon language and manners either survived the revolution; or were, by degrees, adopted by the conquerors. Without pretending to determine that difficulty at present, we shall now endeavour to acquire a general idea of the laws and manners of that people; or of the English, anterior to the arrival of William the Conqueror.

The kingdom of the Anglo Saxons was founded in blood. The Britons were either exterminated, or reduced to the most abject state of slavery. None of the irruptions or conquests of the German nations, upon the Continent, seem to have been so terrible and merciless. There, the language and the laws of the ancient inhabitants survived the ruin of their nation, and mingled with, and softened, the

the manners of the conquerors: But, in South Britain, historians have observed, that scarcely a trace is to be found, not even in the language, which, it is said, scarcely admitted of a British word, the names of places excepted.

The Anglo Saxons were divided into three classes; the lowest were slaves, who, together with their families, lay at the absolute disposal of their masters. To this situation, numbers of the British captives were doubtless reduced; others fell into it upon account of debts or crimes. Even after these unhappy people obtained their liberty, some humiliating distinctions, like those of the freemen of the Romans, still attended them: They, however, enjoyed personal liberty. The country slaves were called *villains*, or *villani*, and were bound to the soil, and transferable with the land.

The next rank of people were perfect freemen, under the name of *Ceorles*. These, it is conjectured, were the successors of the Saxon common soldiers. They were generally husbandmen and farmers of the lands of the nobility, and are the predecessors of the English yeomenry. Immediately above these, there were the noblemen, or superiors of different degrees, under the general title of *Thanes*, *Eoldermen*, or *Earls*: These had been the companions of the leader of the army, the *Comites* of the ancient Germans, mentioned by Tacitus, who followed the chief to war, and attended him in peace. The lands portioned out to these great men came to be termed *Thane lands*. It does not appear that these grants were burdened with any positive services, but bestowed simply in confidence that the receivers would not degenerate from their ancient manners. War was a pleasure, not a necessity; and therefore, the feudal ideas, which afterwards arose, seem to have been unnecessary and unknown. The Saxons, in respect of their lands, however, were subject to what was termed the *trinoda necessitas*, the three knotted obligation. The first of these was to attend the Prince to war, or furnish a foot soldier for the purpose: The second was *arcis constructio*, or the building and keeping forts and castles in repair, which had been erected for the public good:

good: The next was the *pontis constructio*, the building and repairing of bridges. There was also a right of carriages, and furnishing provisions for the King, which appear to have been very light in the Saxon times. Upon the death of the Thane, a heriot was paid to the King; that is, a present of horses and arms, according to the rank of the deceased.

With respect to the political constitutions of the Saxons, an idea may very soon be obtained of it. The Germans, in their woods, divided themselves into *pagi*, which suffered a subdivision. The same thing was put in practice in the countries of their conquest. The county or shire, and the *pagus*, *hundred*, or *centena*, were all known on the Continent long before the famous division of that kind of the lands of England, completed by the command and direction of Alfred the Great. The smallest division established, was that of ten families, called a *free borgh*, *tything*, or *decenary*, under the management of an officer of the name of *Borgh-holder*, or *Tything Man*. This officer was chosen by the tything itself; and it behoved every freeman of the community to be a member of one of those little societies. The members of it were called together by the head officer, and were all pledges for each other: They formed a court; and all disputes of little moment were terminated among themselves. Upon the misdemeanour of any of the members, he was turned out from the society; nobody would be *borgh* for him; so that he became an outlaw, a vagabond, and perhaps was happy to fall back into slavery, to support his existence. Ten of these tythings made a hundred; a division also well known in Germany, and to the several nations issuing from it, under the appellation of *centena*. The hundred met frequently in the year, sometimes every month; the officer who presided was termed *the Hundredary*; and the assembly itself was called *Wappintak*; for one of the principal causes of the meeting was to review the strength of the hundred. The spear of the principal officer was put up, and every member touched it with his own, as a symbol of obedience, and obligation to fight under

were the Judges; but, in order that the causes of parties might be properly stated and pled, some there were who made law their profession. These the Saxons termed *Lauchmen*; resembling, in a great measure, the Scabini of the Franks, and other German nations, formerly mentioned. The King and his council, or court, consisting of officers attending on his person, presided over the whole. In this manner justice was administered in England under the Saxon polity, which was now drawing to a close.

Edward I. in his younger days, had been patronised by Robert Duke of Normandy. In that Prince's court he spent the best of his days; and, when King of England, was ever surrounded with a croud of Normans, whom his fortune had attracted. The favours bestowed upon these strangers brought on an open rupture between the King and the great Earl Godwin. This nobleman and his family aspired to the throne; and all their intrigues were bent to that object. The King's own wishes were divided between the Duke of Normandy, and his nephew at the court of Hungary. Edward determined like a saint and a confessor, and invited the rightful heir to succeed. This last Prince died about a month after his arrival in England, leaving a young son, called Edward Atheling. Upon the death of Edward the Confessor, Harold, the son of Godwin, seized upon the throne, with no other title but that of other usurpers, power and opportunity. The resistance he met with was not from the lawful heir: Another rival, with pretensions far inferior to his own, invaded his kingdom at the head of a foreign army, killed him in the field, and subjected England to new and unlooked for masters. This formidable rival was William the bastard, Duke of Normandy, who, by the concurrence of all writers, and of all historians, first brought over, and established in this island, the proper laws and consuetudes of the feus, as they had been received in Normandy, the country of the conquerors.

The Normans, then, are the last of the foreign nations of whom any account is necessary in the present subject. The Danes, for a long

evident, that the ideas of the feudal law had grown up in France, but were perfectly new to Rollo and his people.

The Normans, in their new settlement, grew a different people: They received all the polish the times could afford, and retained the bravery of their ancestors: They adopted the feudal manners of the country in which they settled; retaining, at the same time, a number of their own original customs: And hence the jurisprudence and feudalism of Normandy, though bearing a general resemblance to the other provinces of the kingdom, yet differed in a variety of particulars both of form and of practice; and these, to this day, continue to distinguish the laws and customs of England.

Robert Duke of Normandy, as before observed, had been the patron and protector of Edward the Confessor in his youth. This Duke had his son William by a daughter of a tanner in Falaise; and as bastardy, at that period, was not attended with any degree of reproach, he, though the son of a concubine, succeeded his father by common consent; and so little did he consider the circumstances of his birth to be a reproach, that it was not unusual for him to subscribe, '*William the Bastard.*' Original letters of his are still in preservation, bearing this signature. Upon the death of Edward, William, who had ever his eye fixed upon England, pretended that Edward had actually made a will in his favour; but he never was able to produce it. He further said, that Harold, the son of Godwin, was an usurper; and that, in the life-time of Edward, he had ceded to him all right and pretension, such as he had, to the succession of England.

The only proof brought by the Duke of Normandy of the will of Edward, or cession by Harold, was an army of sixty thousand Norman adventurers, determined to share the fortunes of their Prince. At the head of this army William landed in Suffex, on the 26th September 1066. In stepping from his boat upon the shore, he slipped a foot, and fell upon the ground. To prevent a superstitious construction of the accident, by an admirable act of recollection, he loudly exclaimed, in the hearing of his followers, ' I take possession
' of

* of England; it is mine; I seize it with both my hands.' This was the right of investiture he pretended to England. Harold, though an usurper, had the voice of the nation. William had nothing for him but his Normans. The competitors met at Hastings. The English army was defeated; and Harold and his two brothers fell in the field. William marched his victorious army to London; and at last received the submission of the whole nobility of the kingdom, not excepting Edgar Atheling himself, the true heir of the Saxon line.

Like the conquerors on the Continent, William parcelled out England among his Normans, according to their rank and their merits. Hugh Capet, a little before this period, had usurped and weakened the kingdom of France, by solemnly confirming the possessions of the nobility of that kingdom as hereditary fiefs. William strengthened his usurpation by the same means; and England, from that time, became a feudal kingdom, subject to those usages which, on the Continent, had grown to a regular system.

At this eventful period, we find our own country of Scotland beginning to make a figure in the history of Europe; and, therefore, our next business will be, to give an idea of the laws of its inhabitants.—The northern parts of this island, every body knows, were inhabited by two nations, or tribes, who, according to the Romans, went under the name of *Scots* and *Picts*. From whence these people came, is, like the origin of other nations, involved in obscurity and fable. All that can with certainty be inferred, is, that they were tribes of the *Celtae*, belonging to the same numerous race whom we have been considering under different appellations. This part of Scotland, between the Clyde and the Forth, was a Roman province, under the title of *Valencia*, frequently recovered by the ancient inhabitants, reconquered by the Romans, and fortified by walls *. When the Romans left the island, these people

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joined,

* Hence Buchanan made his country that elegant compliment, in the beautiful Epithalamium upon the marriage of Mary with Henry Darnley :

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joined, and attacked the southern Britons. Father Innes, of the Scots College at Paris, who wrote an ingenious treatise upon the subject, published in the year 1726, says, that they were driven back by the Saxons almost to their ancient territories; and that this country, as already mentioned, for a long period, made a part of the Anglo-Saxon kingdom of Northumberland; that it was conquered by the Picts in the year 695, owing to the divisions and weakness of the Saxons; but that the Saxon language and manners kept their ground, notwithstanding this revolution. The war, which had seldom ceased, between the Scots and Picts ended at last in favour of the Scots; who, under their King Kenneth, made a complete conquest of the whole Pictish dominions about the middle of the ninth century.

The learned and accurate Lord Hailes commences his Annals of Scotland with the accession of Malcolm Canmore, in regard that very little preceding that period is to be depended upon. Granting this to be the case, our antecedent history is not therefore to be rejected. That the Scots were a people, and governed by a succession of Kings, anterior to Malcolm Canmore, is undeniable. We must therefore take our history of those remote periods, such as it is, in the same manner as other nations do theirs, under the correction of sense and sound criticism.

Duncan, King of Scotland, was dethroned and murdered by Macbeth in the year 1034. Duncan left two sons by his wife, the sister of Siward Earl of Northumberland. The young Princes fled from the usurper; and, upon Edward the Confessor ascending the throne of England, Malcolm lived under his protection. The oppressions of the usurper excited an insurrection in Scotland, which was headed by M'Duff, Thane of Fife. The Earl of Northumberland, by allowance of Edward, marched an army to the aid of his nephew. Macbeth,

——— *Hic contenta suos defendere fines,
Roma securigeris, praetendit moenia Scotis.
Hic spe progressus posita, Carronis ad undam,
Terminus Aufonii signat divortia regni.*

by degrees, to the language of the Scots; but, in the reign of Malcolm, from the causes above mentioned, the English tongue, which, from the Norman conquest, became a compound of the French and Saxon, began, we are told, to be the language of the court, and to spread over the lowlands of Scotland; the ancient Gaelic being confined to the corners and extremities of the kingdom. For the same reasons, the names and language of the Picts were as completely annihilated, after the twelfth century, as if such a people had never existed.

The late ingenious Mr Walter Goodall, Librarian to the Faculty of Advocates, published an edition of Fordun, our oldest and most authentic historian, in the year 1759, with an Introduction to the History of the Scots, written by himself. This short treatise has deservedly a very high character for learning and depth of research. The author combats the propositions of Hather Innes, and preceding historians, regarding the ancient inhabitants of this country. He denies that the Saxons had ever any establishment in Lothian, or in the country betwixt Forth and Tweed, which he insists to have been constantly occupied by the Picts until the conquest of that people by the Scots. Mr Goodall, in this point, seems not a little to be under the influence of that deep riveted national prejudice, which will not admit of any original mixture, or connection with the English. These veteran Scotsmen hold fast by every thing which distinguish us as a nation; and seem to think, that the honour of our ancient kingdom is concerned in establishing such distinctions.

Independent, however, of all other reasonings upon the subject, one great and certain monument remains, which every man of reflection will prefer to volumes of artificial argument. The pure Saxon language, without the least mixture of the Gaelic, beyond all records we are masters of, has been the established language of the low countries of Scotland; and at this moment, the English have to illustrate the phraseology of their own authors by our northern dialect. If we are to reason from what happened among all other nations,

by many more. French was the language of the court, and of every man of power in England. To establish it in the country, it was made the language of the law; and yet all would not do. The Saxon, the dialect of the old inhabitants, not only kept its ground, but excluded the other. How, then, can we suppose that a few Anglo-Saxon exiles, coming to Scotland, should have imposed their language upon a strange people, and totally excluded the national dialect? The inhabitants of this country, before the conquest of the Scots, have been undoubtedly Saxons; and here, as in other countries, the conquerors lost their language, and perhaps their manners, among the conquered.

In the reign of Malcolm Canmore, however, our certain history begins; and, consequently, the certain history of the law of Scotland. We have nothing written upon the subject of law, excepting a short capitulary, published in Skene's collection, under the title of *Leges Malcolmi*, i. e. the Laws of Malcom II.; and, therefore, these pretend to a higher antiquity than the period we have been speaking of; for Malcolm II. began his reign in the year 1004. They are introduced with the famous preamble, which has so much perplexed our antiquaries and lawyers: 'King Malcolm gave and distributed all his lands of the realm of Scotland among his men,—' and retained na thing in property to himself bot the royal dignity, 'and the Mute Hill in the town of Seoon.

'And all the Barons gave and granted to him the ward and relief of the heir of ilk Baron, when he sould happen to deceis, for the King's sustentation.'

One class of our antiquaries and lawyers venerate this relic as a genuine capitulary of Malcolm II.; and of this, it is a consequence, that the feudal law had been established in Scotland long before it was known in England, or, in other words, before the Norman conquest. Another class hold it as a fixed maxim, that the feudal law was adopted in Scotland in imitation of the English; and, consequently, that the laws attributed to Malcolm M'Kenneth are the work

work of a posterior and ignorant compiler. Sir Henry Spelman, with great modesty, states a number of strong objections against the supposition of these laws being attributed to Malcolm II. Sir Henry, therefore, conjectures, that Malcolm II. has been mistaken for Malcolm III. Admitting this variation, it would follow, that Malcolm Canmore, imitating William the Norman, imposed the feudal law upon his country as a matter of expediency and improvement. It is not our present province to enter into the particulars of these disputes. It is sufficient to notice the several opinions, because they are historically instructive.

The conjecture of Sir Henry Spelman relating to the mistake of the name of the Prince, to which these laws are commonly ascribed, has been adopted by Lord Kaimes in one of his first performances, the *Essay upon British Antiquities*; and his notions have been implicitly followed by Sir John Dalrymple, in the *History of Feudal Property*.

It has already been observed, that the Saxon laws and customs had, long before the Norman conquest, admitted a considerable proportion of feudal principles and forms; not to say that they were borrowed from any system of the feudal law, but as naturally growing out of the ancient manners and situation of the kingdom. The state of the kingdom of Scotland, and of its lands, is thus described by Fordun, the eldest, and most authentic, of our historians. Speaking of Malcolm II. he says, ‘ That, though he held in his own possession the whole lands, countries, and provinces, of the kingdom, ‘ after the manner of his predecessors, history reports him so generous, or rather so prodigal, that he gave away the whole; retaining ‘ nothing to himself, except the little mount of the royal seat of ‘ Scone, whereon our Kings sitting on their throne, in their royal ‘ robes, pronounced judgment, and enacted laws for their subjects. ‘ Anciently (continues our author) our Kings used to bestow upon their subjects more or less of their lands; perhaps some portion of a province, or a thanage; for at that time the whole king-

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‘dom was divided into thanages, of which the King made gift as he
 ‘pleased. To labourers he gave them for a rent from year to year :
 ‘To freemen or gentlemen he gave them for ten or twenty, and
 ‘sometimes for term of life, with one or two heirs at most: To
 ‘some Knights, Thanes, and chief men, he gave them to perpetui-
 ‘ty; not so freely, however, but that they were obliged to pay a
 ‘certain annual acknowledgment to the King *.’

This account, imperfect as it is, seems to contain the progress which it is supposed the feus proceeded in. Hence the writers we have mentioned conclude, that a degree of feudal customs and principles had found their way to Scotland, in the same manner as in the south, prior to the reign of Malcolm Canmore; for they suppose, that this account of Fordun should belong to Malcolm III. and not to Malcolm II. The only thing that can be certainly inferred from this passage is, that tradition, in Fordun’s time, had handed down, that the state of land had been the same in Scotland as among the Saxons anterior to the conquest; and, particularly, that thanages, or thanestry, made the capital honour among the subjects, in the division of the land, in both kingdoms; and, indeed, nothing can be a stronger proof of their having been originally the same people.

Lord Kaimes then holds forth the conduct of Malcolm, upon this occasion, to have been a stroke of able and successful policy. ‘The
 ‘King of Scotland (says he) envied the power and greatness which
 ‘the establishment of the feudal laws had bestowed upon William
 ‘of England. Malcolm had not, like the Normans, conquered Scot-
 ‘land: Force, of consequence, could not be available with his own
 ‘subjects; and thence it was that he assailed them upon their weakest
 ‘side, avarice and vanity. He granted the remaining crown lands
 ‘to the principal nobility, in such portions as he pleased, and was
 ‘entitled to qualify the grant with feudal conditions. It was this
 ‘Prince (continues his Lordship) who first introduced charters into
 ‘this

* Fordun, vol 1. b. 4. c. 47.

'this kingdom. A charter was a necessary evidence of the new gift; and the receivers would not probably hesitate to include their former estates in the same deed. Malcolm Canmore, it is observed, lived thirty-six years, and, consequently, had time to make considerable progress in the plan during his own life time.' Such is the system of Lord Kaimes. Difficulties which frighten and perplex those who refuse to move but in the road of certainty, serve only to diversify the prospects of the theorist, and to enliven his journey. Though the account now given be extremely plausible, it vanishes at a nearer view. It is objected, that Malcolm III. was not a politician but a soldier: That his constant war with the Conqueror, and his son William Rufus, left him no time for plans of legislation: No instance is preserved in history, nor any one fact, from which that Prince's knowledge of civil business is to be inferred.

Lord Hailes has published a Critical Inquiry into the Authenticity of the Laws of Malcolm. In this Inquiry, his Lordship revives the objections of Sir Henry Spelman, and follows them into their consequences; concluding from the whole, that the capitulary upon which Lord Kaimes's ideas are founded, is not ascribable even to Malcolm III. but have been composed, or rather forged, during the fourteenth, in place of being a royal work of the eleventh century.

Notwithstanding all this criticism and research, it is certain that the laws of Malcolm, so terribly pulled to pieces by modern antiquaries, are acknowledged to have been the authentic law of this country, by a special act of our ancient parliament *; and, upon that authority, Sir John Skene placed them with propriety in the front of his collection. Parliament does not adopt these laws as a part of an ancient code then recovered, but alludes to them as a part of the known statutory law of the country; and, therefore, the public acknowledgment of them must have reached very far beyond the date of that act. Whether the laws in question can be ascribed to Mal-

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* Chap. 113th of the 14th parliament of James III.

colm II. or Malcolm III. or even to a posterior reign, it is certain that the ordinances they contained were the genuine laws of Scotland at a remote period, and have been as such received by the nation. We have no better illustration of the customs and manners they refer to; and, therefore, they are to be retained and used both by the antiquary and lawyer. It is very probable, however, that the celebrated preamble is no other than excerpts from Fordun, or some of the Abbay Books, and that it has been annexed to a genuine chapter of laws enacted by some of our Princes long posterior to the conquest. 'I am of opinion (says Lord Hales) that the feudal law was 'gradually introduced into Scotland, not by the authority of any 'one monarch, or in the course of a single reign, but the silent operations of the fears and prejudices of men concurring with the 'cidental state of the kingdom.' By the arguments, however, which his Lordship adds for supporting this general opinion, it is evident that he gives a date to the whole of these silent operations, posterior to the reign of Malcolm Canmore; and, indeed, we have no hesitation in acceding to his Lordship's opinion.

Had our celebrated body of laws, which have for ages gone under the title of the *Regiam Majestatem*, been written by order of David I. of Scotland, and promulgated in the reign of that Prince, there would be an end of the dispute; for the *Regiam Majestatem* is a system of the feudal law, founded upon the acknowledged and fundamental principles of that system, though by no means according to the particular rules of the Books of the Feus. David I. reigned from 1124 to 1153; and the first writer upon the law of England, as before mentioned, is Ranulphus de Glanville, who was Chief Justice of England in the reign of Henry II. from 1180 to 1189; so that, if our *Regiam Majestatem* contains the laws of David I. as published by Skene, then we, of Scotland, had a feudal book about forty years before any treatise of that kind appeared in England. Upon comparison

* Annals, vol. 1. p. 30.

parison of these books, a grand difficulty arose, which has divided all our antiquaries and lawyers since the days of Sir John Skene. It appears beyond a dispute certain, that Glanville's treatise, the two first words of which are *Regiam Poteſtatem*, either is a copy of the Scottish *Regiam Majeſtatem*, or the Scottish book must be a copy of Glanville; and the question has been, and ſtill ſubſiſts, which of them is the original? On the one ſide, Sir John Skene, Sir James Dalrymple, followed by many of our writers, declare themſelves in behalf of the authenticity of the Scottish *Regiam Majeſtatem*. They contend, that it is a genuine code of the laws of Scotland, promulgated by order of David I. On the other hand, Sir Thomas Craig, Lord Stair, with ſeveral others of note, and, of late, particularly Lord Hales, acknowledge their perſuaſion that the *Regiam Majeſtatem* has been copied from Glanville, interpolated with matters relative to Scotland, and impoſed upon the nation as a capitulary of one of their ancient Princes.

Sir Thomas Craig, in denying that the Books of the Majeſty had any relation to the law of Scotland *, too evidently betrays that he had paid little attention to the ſubject: He would otherwiſe have perceived, that the undoubted ſtatutes of our Princes, prior to James I. relate to the very ſame jurisprudence, the ſame cuſtoms, and the very ſame forms of procedure, mentioned in the *Regiam Majeſtatem*; he would have found, that the Norman tenure of ſoccage is there mentioned as a tenure known in Scotland; nor, without ſearch or inquiry, would he have aſſerted, that the term was not to be found in any charter of this country. Even at this diſtance of time, ſeveral charters have been found, of lands in Scotland granted *per expreſſum* in ſoccage. Mr Erſkine has printed one of them, No. I. in his Appendix. Beſides, what our author thus ſo ſtrongly avers in one place, is inconſiſtent with what he himſelf has, in the courſe of his treatiſe, been obliged repeatedly to acknowledge. In his account of the feudal

* Page 85.

dal law, he says, that we originally had it by adoption or imitation of the French; and yet he says, that the Books of the Majesty are to be rejected, because the ordinances contained in it seem to be of Norman extraction. Because Sir Thomas Craig and Lord Stair refused to know or acknowledge any jurisprudence but the Roman, and the Books of the Fiefs, that was no reason for the rejection of the Books of the Majesties, or other remains of our former law, and declaring, upon their own authority, that they contained nothing which had ever been the law of Scotland. What is the authority of these authors when opposed to that of the legislature, which repeatedly acknowledged these books, and ordered them to be revised and amended, by a committee chosen from the three estates; and that in order to be accommodated to the times, and continued as the municipal law of Scotland *? History may be interspersed with fable, and charters of Princes, and deeds of private men, may be forged; but to suppose with Craig and Stair, that a whole system of law, foreign to the manners of a nation, has been stolen from another country, and obtruded upon it, is to believe what was never known to happen in this world before, and what appears to be absolutely impossible in the nature of things. On the other hand, it is in no degree improbable that a capitulary, or a treatise, in which the consuetudinary law of a country is reduced into writing, may find its way into another country, where the law is the same, or nearly the same; and that, in process of time, such a book may be universally supposed, or mistaken for, an original work of that country. If the book places in order things which are already known and in use, the dispute about its production is a mere contest of local honour: But it is different, indeed, if that book contains a system opposite to every thing that is established, and pretends to operate a revolution in mat-
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* This was done by no less than three several statutes: The first by one of our oldest parliaments, and under the wisest of our Princes, James I. anno 1425, c. 24; afterwards, anno 1487, c. 115; and, last of all, so late as 1633, c. 20.

ters of which all countries are jealous and tenacious. According to the opinion, however, maintained by our great lawyers, either such a revolution must have happened in Scotland, or what is, if any thing can be, still more incredible, the legislature of Scotland has expressly acknowledged certain books to be laws which never were so: They have ordered a system to be revised and amended for the use of the nation, which the people neither knew, nor at any time received.

After having said so much against the opinions which deny the Books of the Majesty to have ever been a code of Scottish laws, or to have related to our manners, or regulated our practice, we mean to go no further with the supporters of these books, but to strike a medium in the dispute. From a close comparison of Glanville's work with our Books of the Majesty, it evidently appears that the latter has been copied from the former, and afterwards adapted to the meridian of Scotland, by the insertion of so many chapters, and the interpolation of particular parts. We add, that the law of Scotland and England were nearly the same in the time of Henry II. when Glanville wrote his treatise; and that his book has been brought to Scotland, and altered by one or other of our juridical priests, and inscribed with the name of David, who was equally a legislator and a saint, that is, a patron of the clergy. The several MSS. of the *Regiam Majestatem* have been examined, and a variety of particulars have been observed in them, all tending to increase the probability of the foregoing supposition. Every body who has written upon this subject has hazarded their conjectures; we are also at liberty to do the same. In the year 1174, William King of Scotland, surnamed *the Lion*, grandson of David I. invaded Northumberland: A party of the English, commanded by this very Ranulph de Glanville, the author of the *Regiam Poteſtatem*, surprised and took the King of Scotland prisoner, near Alnwick Castle; from whence Glanville carried him to Richmond Castle in Yorkshire; and from thence Henry carried him prisoner to Normandy. The only price, it seems, at which the Scots could purchase the liberty of their Prince, was the
extravagant

extravagant one of a surrender of the independency of their kingdom. By consent of the barons and clergy of Scotland, William became the liege man of Henry for that Kingdom and all its territories, and at the same time gave his brother David, and many of the principal barons of the kingdom, as hostages; and in this situation of acknowledged vassalage, the kingdom remained during the lifetime of Henry II. It is not, therefore, a forced or improbable conjecture, that Glanville might bestow upon his prisoner, the King of Scotland, a copy of his treatise on the laws of England; or that Henry should have purposely given, or afterwards sent, a present of his Chief Justice's work to the King of Scotland, to be used for the benefit of the kingdom, with which he supposed himself immediately connected. If the laws of both countries were nearly the same at the time, it was natural for William to recommend this new performance to the use of his judges; and the real author being forgot, it was also natural for the Scottish priests to add those things which were peculiar to their own country, and to ascribe the whole to David. We hazard this as a conjecture, and no more. It has at least the merit of reconciling all the objections moved upon both sides of this celebrated dispute, in which it is impossible to take any part, without being exposed to difficulties unanswerable; a thing which, of itself, seems to say that truth lies between the two extremes.

We have taken pains to make this celebrated contest properly understood, because it behoves us to view our ancient code in a proper light; and because, independent of its aid, it would be impossible to understand any thing of the history of our law, and still more impossible to comprehend the learning of its forms.

Forms

Forms of Transmission anterior to the Fiefs.

AFTER the general history which we have endeavoured to give of the laws and customs of the inhabitants of Europe, posterior to the dismemberment of the Roman empire, it will now be necessary for us to make an inquiry into Forms of Writs, preceding the publication of the Books of the Fiefs in the eleventh century: In doing which, it may perhaps be imagined, that nothing but conjecture can be offered; which happily, however, is by no means the case. There yet remains as much of the ancient Roman conveyancing, as will be sufficient to give a most satisfactory notion of the forms of transmission of land property among that people, at or before the ruin of the empire. These remains have been published by several of the learned, particularly by Father Mabillon, and the Marquis Maffei, in his *Istoria Diplomatica d'Italia* *. The first of these, which we shall endeavour to give an idea of, is a contract of sale of a property termed a *domicile*, written upon Egyptian paper, and preserved in the library of the Vatican. In this contract, the seller speaks in the third person: He acknowledges that the purchaser has paid the price agreed on, out of his purse, in numerate money, with which he is satisfied, and has no more to crave: He therefore promises, that neither he, nor his heirs, shall ever quarrel, object to, or endeavour to invalidate, the sale; and that under the pe-

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* Maff. Ist. p. 155. Diplom. vol. 5. p. 645.

nalty of paying a considerable sum, which is the warrandice of the deed. The bargain is declared to be perfectly free of fraud, force, fear, and circumvention. It is concluded by a solemn stipulation in these words: 'De qua re, et de quibus omnibus suprascriptis, stipulatus est Montanus vir clarissimus Notarius Emptor spondit qui supra, ad omnia suprascripta in verbis solemnibus.' The sign, or signature, of the seller is thus expressed: 'Signum Dominici viri honorandi suprascripti venditoris, literas nescientis.' And the subscription of the witnesses is thus declared: 'Paulus Argentarius his instrumentis, portionis fundi domicilii cum aedificio, vel censum qui viginti-quinque appellatur, rogatus a Dominico, viro honorabili suprascripto venditore, ipso praesente, testis subscripsi et suprascriptum praetium quadraginta solidos ei in praesenti traditos vidi, et mei praesentia signum fecit.' This attest is repeated by each of the witnesses.

To such as are versant in the Roman law, it is unnecessary to take notice, but it is proper that those who have not made it their study should know, that the Romans, in all their transactions and agreements, in which any species of obligation was undertaken, used a form of interrogation and answer, the words of which were fixed by the law. The party in whose favour the obligation was to be made put the question, and the obligant, either by himself, or another sufficiently authorised for the purpose, made the answer. It is from thence we have retained the common word *to stipulate*; by which is understood, not the making of a bargain in general, but the particular terms of it. Some of the Roman juriconsults derived the word *stipulatio*, from a part of the ceremony which was anciently observed. The parties, in token of agreement, took a stick, a straw, or rush, into their hand, and broke it in two, each keeping his own half. When the one party called for performance, he produced his half, and desired the production of the other, in order to prove the agreement. The rigidity of the ceremony was relaxed by the Emperor Leo, who dispensed with the strict conformity to the words.

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ly, expunge the seller's name out of the public rolls, or tax books, and put in its place the name of the purchaser. The purchaser is, in the letter, termed *Notary of the Wardrobe of the Emperor*; and the price is twenty golden solidi. After having informed them of the circumstances of the sale, he thus proceeds: 'Ideoque Domini, accepta hac epistola mea, forte vestra gravitas dignetur quolibet modo, aut quolibet tempore, quando eidem emptori placuerit, solemnem traditionem celebrari, ut agnoscat omnia ad se pertinere; nomen quoque meum ex apodypticis publicis eximi faciatis, et nomen superscripti emptoris in loco prosterni faciatis.' The letter bears to have been dictated by the seller to an honourable man, Stephen, his notary, signed with his sign, and sent to the magistrates; after which, he abandoned the possession of the property.

It is impossible to conceive a surer, or more solemn mode of sale. The letter of tradition is a complete precept of seisin, directed to the magistrates of the town, who at that time, as they do at this moment, seem to have had the power of giving investiture within their own territories. The tradition is not symbolical, it is real; for the vender declares, that he has left the property void for the purpose. It is exceedingly curious, that the seller does not require the registration of the deed of sale, but of the letter of tradition, or precept of seisin, precisely as we do at this moment: And what can we term this but a clause of *registration*? Next follows the *res gesta*; that is, the procedure of the magistrates in consequence of this request. They act with wonderful precaution: They send a deputy, one of their members of court, to inquire of the vender if he acknowledges that to be his letter. These members make a report that the grantor acknowledges, and desires execution of it. They therefore pray, that the letter or precept may be recorded immediately, to which the magistrates consent; and the purchaser, who is present, asks that an act may be made out upon the whole transaction, according to the ordinary form. This is the act which we have now analysed; it is written,

written, as before mentioned, upon Egyptian paper, and it answers to an ordinary extract from our register, the common preamble of which has been borrowed almost *verbatim* from the ancient *gestio* of the Romans. The clerk or notary of the town, under the title of *Exceptor*, closes the instrument in these words: 'Deus deditius exceptor civitatis suae his gestis edidit rogatus *.'

Lastly, the name of the seller is ordered to be erased out of the tax or cels books, here termed the *apodypta publica*, and the name of the purchaser filled up in its place, precisely as is done in our modern sales of land property.

Father Mabillon has imparted to the public another deed from the original, written upon Egyptian paper, dated in the year 491. It is a donation of a property to the church of Ravenna, granted by an illustrious lady named Maria. The donatrix declares, that she has dictated to her notary the terms of her grant: That her ignorance of letters obliges her to sign by making the mark of the cross. In further security, she begs a friend to subscribe for her; and several persons of distinction to witness the whole transaction. She next gives a warrant for putting the church in possession: Then, addressing herself to John Bishop of Ravenna, she requests that he may procure the deeds to be registered in the municipal acts.

It is followed by the *gestio* of registration, which, like the others, is interlocutory, the very same with our own; i. e. a procurator appears for the party, produces the deed, and requests it to be registered: The magistrates find the request reasonable, and order it accordingly. The testing clause of this deed is exceedingly curious; we shall transcribe it from the original: 'Chartulam Jovino notario meo scribendam dictavi, cuique, quia ignoro literas, signum crucis feci, ad quod Castorium V. C. carum meum, ut pro me subscriberet conrogavi, nobilesque viros, qui suas subscriptiones dignanter adnectant, pari supplicatione poposco.'

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* Maffaei Hist. Diplom. pag. 155.

We shall find, that all the forms of the succeeding ages appear to be but broken pieces of those we have considered. Several other original deeds of the same period are preserved, and published by the learned Marquis Maffei, in his Diplomatic History, and they all resemble one another. The sellers dictate the contents to the notaries, and subscribe by their marks or *signa*, which appear to be arbitrary; sometimes a circle, but mostly the figure of a cross; for in the Roman world, since the days of Constantine at least, the cross became the favourite figure upon all occasions. There is the same specification of the price, stipulation, tradition of the property, and *gestio*. The tradition, universally, is first symbolical, and then real; the one gives right to the other; but there is not the least vestige of the former independent of the latter. The last remark we shall make is, that the notaries of those days were beginning to write worse Latin than they do at this moment. None of these instruments are free of the most disgusting corruptions: *Subscribi* for *subscripti*; *quinquem* for *quinque*; *draditos* for *traditos*; *hinstrumentis* for *instrumentis*, &c. Since this was the case in Italy itself, the country of the Latin language, we cannot be surprised at the barbarisms elsewhere to be met with.

There is also preserved a celebrated vendition of a house, in the purest and strictest forms of the Roman law, and allowed to be so by all the judges and learned men upon the Continent. It is a sale by Pascutius Culita to Segnitius Funestello: And, accordingly, as Roman form, it is published by Brissonius *. This curious instrument, after the receipt of the price, the dispositive words, and a description of the premises, exceeding in detail and verbosity any deed of the kind known in modern times, contains also the act of surrender. The notary speaks in the instrument; and, after having declared the mind of the parties, he directs them in the ceremony 'Tu, Pascute, fuste illum investito:—Tu, Segnite, fustem in capito.'

* Book 6. pag. 559.

It is curious to find that property, among the Romans, was transmitted by the form of resignation; and still more so, that the symbol of such resignation should be the baston, which we have always been taught to consider as a ceremony purely feudal: Nay more, here is the vest and the divest, *vestito et investito*, and yet all the feudalists have told us, that these words, and this phraseology, originated in that system. The deed is tested in this manner. It is the notary that speaks: 'Hæcce, uti vera sunt sciens, volensque, suae spontis, atque ex convento, utque inter viros bonos decet, uterque agit, meque ut scribam rogatis, jureque-jurando, cuncta hæc confirmatis. Testes adfunt more adsciti, rogatique, viri utique probi.'

In all these deeds, it is the solemnities which make the sale; and the posterior writing is no more than the evidence of these ceremonies. The notary declares, that the parties had first agreed among themselves, and what they did, of consequence, was *ex convento*. The delivery of the rod, or baston, here, is not meant to be symbolical possession of the land; it is meant only to denote the will of the seller, who delivers up his property. The real possession immediately followed by the authority of the notary, in whose presence the whole transaction passed. Thus the transmission of property of the Romans of the western empire, towards their decline, was executed in forms, and in technical language, to which we are no strangers. We see the resignation, the tradition, the *seisine*, the instrument of that *seisine*, and the registration of it, in practice among the Romans, either at or before the irruption of the barbarians, and the mixture of their customs.

We shall next inquire what changes, in these matters, took place in Gaul after the conquest of it by the Franks; and we shall see, that these changes are not many: That the barbarians, as they adopted the Roman language, complied with the whole forms and ceremonies of transmission which they found in the countries of their conquest. Upon this head, we are able to give information of the most certain and satisfactory nature, taken from a complete book of styles and:

and forms, composed for the very same purpose as our books are at present, that is, to assist the notaries of the times in the formation of all kinds of instruments used in the evidence of the transactions of civil life. This style book was written by a Monk named Marculfus, about the year of our common aera 660, at the desire of the Bishop of Paris. The authority of the book is unquestionable; and there we shall find not only the rudiments, but the complete form, of all our system of deeds and instruments, used in the modern transmission of land property. The profession of the author points out, that, even at this early period, the department of conveyancing was in the hands of the Monks; and the forms themselves completely prove, not only that the evidence of writing was principally trusted to in the business of mankind, but that their transactions, in matter and form, were the very same with their predecessors the Romans of the west, and have been handed down to us through the vast period of eleven ages.

Authentic copies of the work of this early conveyancer were preserved upon the Continent, and published by several of the most learned men in Europe. At last, the celebrated Jerome Bignon, and one of the greatest lawyers of the last century, judged it not below his genius to publish a perfect edition of this ancient style book. 'The laws of our ancestors (says he) cannot have a better interpreter, and the knowledge of the Roman law itself must be thereby considerably enlarged.' Marculfus, in his preface or dedication to the Bishop of Paris, mentions, that he was seventy years of age when he wrote these forms. He excuses himself upon account of his inability for the task, and the rudeness and simplicity of his style. He writes not, he says, for the learned, but intends the examples he has given to initiate youth in the art of writing: The forms he has collected being merely those which he found in practice among his ancestors in the place of his residence.

At this time, viz. A. D. 660, the kingdom of the Franks was governed by the Mayors of the Palace. The Princes themselves were
names,

names, and no more. The Roman Empire subsisted in the east under Justinian, who died only in 685. The Franks in the southern provinces of Gaul adopted the Roman laws and the Roman forms, which they found established among the inhabitants of the country. In the northern provinces, of which Paris was even then the chief city, the Roman laws were also preserved; but, in process of time, they were forced to admit a greater alloy of the customs of the barbarians. The styles of Marculfus are truly the forms of the Roman law, founded upon the Theodosian Code, mixed in some degree with the manners of the barbarians; and the Latin in which they are written betrays strong marks of the progress of corruption. The barbarians for a long time kept up the language of Rome both in speaking and in writing; till at last, both in Italy and France, it sunk into those jargons out of which the modern languages have at last been formed.

Marculfus divides his styles into two parts: The first of them he terms *cartae regales*, i. e. royal charters, or deeds belonging to the court; and the other *cartae pagenses*, charters belonging to the country, or writings of country affairs. The word *carta*, which properly signified *paper*, was at this time, and for many ages afterwards, applied to deeds, concessions, privileges, and to declarations of all kinds. The forms of Marculfus are generally in the shape of letters or epistles; and indeed the antiquity and universality of this practice proves it to be the natural, and the proper form of deeds. After the conversion of the Roman Empire to Christianity, the Emperors both of the East and West prefaced their edicts, charters, and public acts of all kinds, with an invocation of the name of God, of Jesus Christ, and of the Holy Trinity. Thus Justinian begins the proemium of his Institutions: ‘In nomine Domini Nostri Jesu Christi, Imperator Caesar Flavius Justinianus semper Augustus, Cupidae legum ‘Juventuti salutem.’ This form, as we shall find, the churchmen continued in their instruments and deeds; and it remains with us at this moment in all the instruments which we term *solemn*, such as

treaties of peace, conventions, and other public national deeds. Kings of the barbarians, particularly of the Franks, often used same invocation. But, in ordinary deeds or edicts, they de themselves in this manner: 'Clodovaeus Rex Francorum vir 'luster.' 'Clotarius Rex Francorum vir illustris' Simple title this kind were natural and proper to conquerors. It was no ages afterwards that titles of royalty changed from the people to of the kingdom.

The church already had two capital arguments which they to induce men of all denominations to bestow grants of land, riches of every kind upon them. And in these dark ages it that she arose to the superlative pitch of earthly grandeur. The of these arguments was, that people could carry nothing out of world into the other. The only portable commodity was the m of bestowing lands and goods, while alive, to charitable and purposes. To some people it appeared a little selfish, to give every thing for the good of their own soul, and leave their heir poverty. The clergy, however, had excellent salvos. They that a man, by giving, might ensure in this manner both for him and his posterity. They prophesied and spread abroad that world was very near an end, and therefore he acted wisely who expeditiously converted it to the use of his soul. We shall gi forms of these grants both by the King and the subject as our has left them *.

* After the name and address of the King, the deed is thus introduced:
 'ut ait Apostolus, in hoc mundo intulimus, nec quicquam ex eo auferre r
 'terimus, nisi quod ob animae salutem, locis sanctorum devotae Domi
 'impertire videmur. Ergo cognoscat magnitudo seu utilitas vestra, nos p
 'Domini, ad basilicam illam, vel ecclesiam illam, ubi Apostolicus Pater
 'venerabilis vir ille abbas, praesse videtur, villam nuncupatam illam, sit
 'quam usque nunc filius noster tenuit, promptissima devotione cum c
 'visi fecimus concessisse. Quapropter per praesentem auctoritatem r
 'mus, quam perpetualiter mansuram esse iubemus, ut ipsam villam, r

The language of this deed indicates the corruption of the Latin tongue already far advanced. In it we find the narrative, or cause of granting, the dispositive clause, the *tenendas* and *habendas* of our charters; and, in the specification of lands, houses, and their pertinents, we see the evident beginnings of the long tautological clause which afterwards made such a figure in all the grants of land in Europe, and of those of Scotland in particular. By the word *accolabus*, are meant to be conveyed the rural slaves who were bound to the land, who passed with it from hand to hand, and were what, in the terms of the Roman law, are called *adscriptitii glebae*. The lands are given with a particular privilege. They were to be free of fines, which in this deed and in the old laws were termed *freda*. By the ancient manners of the Germans, all offences and crimes were atoned for by mulct or composition to the parties injured, whereof a certain part belonged to the King or the public for the breach of the peace, the German term for which was *freda*. This peculiarity in the manners of these people was the true source of a great part of the criminal jurisprudence of Europe. The church, it will be observed, made early attempts to clear themselves and their property from the civil jurisdiction; and these attempts, it is with great probability thought, led the way, and gave the example to the posterior exemptions of the feudal lords and their property, which was one of the great sources of disorder all over Europe.

K 2

Grants

• *illa, vel antedictus Pontifex aut ille abbas, ut diximus, in omni integritate cum terris,*
 • *domibus, aedificiis, accolabus, mancipiis, vineis, silvis, campis, pratis, pascuis, aquis,*
 • *aquarumve decursibus, farinariis, adjacentibus, appenditiis, vel quolibet genere homi-*
 • *num ditioni fisci nostri subditorum, qui ibidem commanent in integra emunitate, abs-*
 • *que ullius introitu judicum, de quibuscumque causis ad freda exigendum, perpetualiter*
 • *habeant concessam. Ita ut eam et ipsi et successores sui habeant, teneant, et possideant,*
 • *vel quicquid exinde ad profectum ecclesiae illius aut basilicae facere voluerint, ex*
 • *permissis nostris in omnibus habeant potestatem. Et ut haec auctoritas firmior habe-*
 • *atur, vel per tempora conservetur, manus nostrae subscriptionibus subtus eam decre-*
 • *vimus roborare.*—*Marculfus, No. 14. 15.*

Grants of this kind, though made to the church, might, it seems, be called in question by the successors of the Sovereign who granted them, especially where they contained privileges or immunities which incroached upon the prerogative. Upon the death of the Prince, granter of the original charter, therefore, it was necessary to obtain that charter confirmed by his successor. Accordingly, Marculfus gives a form of a charter of confirmation, under that special title. The deed recites the petition of the churchmen, stating the terms of the grant which had been made by the predecessor of the then Prince, and craving that the same may be confirmed by the present one, which is accordingly granted, the original charter being first inspected: ‘ Per hoc preceptum plenius in Dei nomine confirmam, sub eo ordine, ipse et successores vel memorata ecclesia illam terram seu villam teneant et possideant ex nostro permisso.’ Excepting that the former deed is not here *verbatim* inserted, there is no difference between this and our common charter of confirmation. We have always been taught, that a charter of confirmation was a deed purely feudal, which arose from the *dominium directum* in the superior, and the restraint upon the vassal against alienating his feu: But here we find the charter of confirmation complete six hundred years before the books of the feus were written. We discover it at that period to be a form not of the feudal, but of the Roman law. We find it in the infancy of that jurisprudence, when the lands of the Franks and other conquerors had only arrived to be benefices, not feus, enduring only for the lifetime of the granter. We find, notwithstanding, that donations to churches, of lands for perpetuity, were then common; and, that such grants needed confirmation by the successors of the granter, is proved by the formula we have heard; for nothing enters into a style-book but what is established in practice.

In the same style it appears that grants were made of property private men. The words are plain and distinct: ‘ Ita ut eam jure proprietario absque ullius expectata judicium traditione habeat,

‘ n

‘ neat, atque possideat, et suis posteris, Domino adjuvante, ex nostra largitate, aut cui voluerit ad possidendum relinquat.’ Notwithstanding, then, all that is said by the writers upon the feudal law, and by our Craig among the rest, about the gradual progress and stages of the fiefs, it is from this style-book of the sixth century proved, that the barbarian Princes were accustomed to give grants of land in Roman forms, and with Roman freedom; to give it to the grantee and his successors, with the power of leaving it to any body he pleased. Writers will perhaps term these lands *allodial*, and they will prove the distinction from the books of the feus; but the forms of Marculfus establish, that the posterior restraints upon property, and other distinctions of the feudal polity, were by no means hasty consequences of the barbarian conquest. It is plain, that the Roman ideas of liberty in land rights for ages remained in the Roman dress. The property of the King, whether it consisted in lands or money, went under the general name of *fiscus*, which, among the Romans, was the treasure of the Emperor. At this time, whatever lands belonging to the *fisc* of the Prince happened to be given away by him to any of his subjects, stood in need of a confirmation by the successor. The learned Bignon thinks that this was chiefly necessary where privileges were annexed to the lands; such, for instance, as the exclusion of the King’s fines, which seems to have been at that time a common privilege. However that may be, certain it is, that a confirmation was necessary. The form which appears in Marculfus is entitled, ‘ Confirmatio pro secularibus viris *,’ and is in the same style with the former charter of that kind. It proceeds upon a petition of the party, and the production of his original charter, which is often termed a *precept*: ‘ Unde et ipsam preceptionem antedicti Principis nobis ostendit releghendam.’ The charter therefore is confirmed to him and his successors, with full power to give or to leave the property to whom he pleases.

We

* Book 1. No. 14.

† No. 17.

We shall now proceed to consider the transactions of private people, which were sometimes made in presence of the Prince, or of the provincial judge. The twelfth form of Marculfus is a post-nuptial contract of marriage executed in this manner, and is called *preceptum donationis* *. The Roman law, and the laws of the barbarians, allowed of a mutual donation of married persons between whom no children existed; but these mutual testaments, as appears from the fourth Novelle of Valentinian, were made only in presence

* ‘ Si Dominus Omnipotens Creator coeli et terrae, permisit in principio, masculum et feminam copulae sociari consortio, dicens, Relinquet homo patrem et matrem suam et adhaerebit uxori suae, et erunt duo in carne una. Si aliquid pro amore dilectionis inter se invicem donare decreverint, hoc nostra serenitas in ipsis non renuit confirmare. Igitur venientes ille et illa in palatio nostro, pro eo quod filiorum procreationem inter se minime habere videntur, omnes res eorum inter se, per manum nostram visi sunt condonasse, et (si ita convenit) villas aliquas inter se visi sunt condonasse. Dedit igitur praedictus vir, ille, per manum nostram, jam dictae conjugii suae illi, villas nuncupatas illas, sitas in pago illo, quas aut munere regio, aut de alode parentum, vel undecumque ad praesens tenere videtur, cum terris, domibus, &c. similiter in compensationem rerum, dedit praedicta femina jugali suo illi, villas nuncupatas illas, sitas in pago illo, cum terris, &c. seu praesidiis domus eorum, argento et auro fabricaturis, drappis, vestimentis vel omni suppellectile eorum, pars parti per manum nostram visi sunt condonasse. Ita ut dum pariter advixerint in hoc saeculum, omnes res super scriptas ab utraque parte pariter debeant possidere, vel si pro animabus eorum aliquid exinde ad loca sanctorum dare decreverint, voluntatis eorum liberum maneat arbitrium, et qui pari suo ex ipsis in hoc saeculum superstes extiterit, ambobus rebus, quamdiu advixerit usufructuario ordine debeat possidere, et post amborum de hac luce discessum, sicut eorum delegationibus continebitur tam ad loca sanctorum, quam benemeritis, vel eorum propinquis debeant reverti haeredibus tam supra scriptae villae, quam et de praesidio eorum quicquid morientes reliquerint. Propterea per praesens preceptum decernimus, et jubemus, ut dum taliter super scriptis illis decrevit voluntas, et per manum nostram invicem condonatum esse dignoscitur, per hoc preceptum, robustissimo jure suffultum atque firmatum, quicquid superius continetur, auxiliante Domino et nostra gratia debeat perdurare. Ita ut nulla refragatio, nec de parte fisci nostri, nec a parentibus eorum propinquis, nec a quocunque, possit convelli, sed omni tempore maneat inconvulsum. Quam vero auctoritatem, ut firmior habeatur vel per tempus conservetur, manu propria subtus eam decrevimus roborari.’

mission of allodial property, which we have always been taught to consider as opposite to the fief in every respect. It must be owned, that, for a long time, we considered our resignation, our confirmation, and our symbolical traditions, as having originated from the feudal principles of superiority and vassalage, and to have been invented to answer the requisites of that system. Upon considering, however, the ancient deeds of our own country, and those traces of its laws which have been preserved, many circumstances of form are to be found not to be accounted for upon any feudal ideas. Upon looking into the ancient English deeds, the difficulty increased from the resemblance to our own. In Mabillon, Marquis Maffei, and other diplomatic writers, we find our common forms reach far beyond the existence of the feus. The constitution and transmission of Roman allodial property, notwithstanding the irruptions of the barbarians, continued in practice for ages over all the Western Empire. To these forms new principles were afterwards annexed; and, with a very few variations, they were rendered subservient to the growing system of the fiefs.

We proceed to analyse the remainder of the form of this resignation. The party disponent has resigned his property into the hands of his Sovereign by the proper symbol; after which, the deed proceeds in these words: ‘Sicut ejus adfuit petito, nos ipsas villas fideli nostro, visi fuimus concessisse.’ This is evidently no other than the common resignation *in favorem*. The proprietor resigns his lands into the hands of his Sovereign, not that he is to keep them, but, at the request of the resigner, to bestow them upon another. One material thing, however, is to be noticed: The laws of transmission were evidently founded upon realities: The resignation was considered as really and substantially conveying the property to the Prince, who might have kept it; which, indeed, would have been an act of tyranny: He grants it to the other party only upon the petition of the disponent; and, when he does so, the whole is understood to be effectually conveyed. This will be understood by reflecting on
what

what has continued from the same ages, and what yet remains in the case of offices, when meant to be conveyed by one incumbent or holder to another person. They are always simply resigned, in the first place, either to the King or to the church, or other corporate bodies to whom they belong. The place is then declared vacant, and the new officer named to it; for no resignation *in favorem* will be accepted in these cases. The new grant, therefore, must be trusted to the good will of the donor, who, after resignation, might give it to whom he pleased. The same ruling principle took place originally in resignations of lands. Of them we shall afterwards find many examples, even in our own Scottish forms, not to be explained upon any other principle. One will suffice at present. In a parliament held at Stirling by the unfortunate John Baliol, young Bruce appeared, and demanded to have his homage received for the Earldom of Carrick, yielded to him by his father. It behoved the King, however, to be actually possessed of the lands in the first place. The record bears: ‘ Et quia per leges regni Scotiae usitatos oportet, quod Dominus Rex fasinam habeat de eisdem terris antequam homagium capiat, ideoque predictus Robertus de Bruce, fasinam de predictis terris in manibus Domini Regis liberavit;’ which was real and complete resignation. A precept was next directed to the Sheriff to seize the Earldom into his hands, by an extent of the whole. Thus the resignation in Scotland, it will be observed, proceeds upon the same principle with the ancient form of Marculfus, *i. e.* it was real, not a mere ceremony, like our after resignation *in favorem*. We now return to the style of Marculfus *:

Here

* The purpose of the resignation being expressed, the charter proceeds: ‘ Quapropter per praesens decernimus praeceptum quod perpetualiter mansurum esse jubemus, ut dummodo taliter ipsius illius decrevit voluntas, quod ipsas villas in supra scriptis locis nobis voluntario ordine visus est laeso verpuisse vel condonasse, et nos praedicto viro illi ex nostro munere largitatis sicut ipsius illius decrevit voluntas, concessimus, hoc est in terris, &c. ad integrum quicquid ibidem ipsius illius portio fuit, dum advixerit absque aliqua diminutione de qualibet re usufructuario ordine debeat possidere,

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‘et

Here we have a complete charter of resignation, containing the substance of all the clauses necessary in our own practice. The learned Bignon, the commentator upon Marculfus, is of opinion, that these forms originated from the method prescribed in the Roman law, before alluded to; and it appears, from the laws of the barbarians, that it was an established rule, that, when a man had no children, and wished to name a successor to himself in heritage, it behoved him to do it either in presence of the King, or the Count of the province and his assessors, or of the King's judges, or *missi Domini*, and to make the tradition or deliverance in their presence. The ceremony, therefore, seems to have taken place, not from any general right which the King had in the lands of the subject, such as was afterwards held to exist in feudal Princes, but upon account of the solemnity, the firmness, and security, which the interposition of his authority was considered to bestow upon the transaction. The only purpose of resigning property into the Sovereign's hands at that time was, that the grantee might derive his right from the King himself, in the same manner as if it had been an original royal grant, and, consequently, the security was more to be depended on than that of any private subject.

What evidently shows this to have been the principle of these forms is, that, in the sales made before the provincial judges, there is no mention of a resignation of the property in their hands; on the contrary, the proprietor speaks in his own person; only, the transaction is passed, and the writing or evidence of it signed in their presence; after which, the symbol of delivery is made by the feller to the buyer, or by the disponent to the disponent, and the judge puts the latter immediately into possession.

The next form which we shall give is a disposition of an area within borough, which, for the sake of notoriety, is addressed to a
Bishop

' et post ejus decessum memoratus ille hoc habeat et possideat, et suis posteris, aut
' voluerit ad possidendum relinquat.'

to the Fisc. As the Roman laws and manners yielded to the increasing darkness of the succeeding ages, and in proportion as the feudal system grew into strength, the freedom of alienation weakened by the same degrees. The feudal Lords came to be considered as the proprietors of the land in their territories; and the right of the heirs of the vassals grew into force, and concurred in producing those restraints upon the alienation, which have reached down to our own times. This growing interest of the heir, and the consequent probability of setting aside the deeds of his predecessor, by which the land property of the family had been lessened, increased these penalties in the posterior transmissions of land property, and especially in grants to the church. The forfeitures grew excessive, and the curses horrible. These were the clauses which figured in the charters of after ages, of which we shall give progressive instances. The beginnings of all these formulas are to be found in the following model of a church grant, preserved in the collection of Marculfus *.

It

* ‘ Dum fragilitatem humani generis pertimescit, ultimum vitae temporis subitanea
 ‘ transpositione ventura, oportet ut non inveniatur unumquemque imparatum, ne sine
 ‘ aliquo boni operis respectu migret de saeculo; nisi dum suo jure et potestate consistit,
 ‘ preparet viam salutis, per quam ad eternam valeat beatitudinem pervenire. Ideoque
 ‘ ego in Dei nomine, ille, et conjux mea illa, pro remedio animae nostrae, et remissione
 ‘ peccatorum nostrorum, ut veniam in futurum consequi mereamur, cedimus a praesente
 ‘ die, cessumque in perpetuum esse volumus, atque de jure nostro in jure et dominatione
 ‘ sanctae Ecclesiae illius, in honore illius constructae, villam nuncupatam illam, sitam in
 ‘ pago illo, quae ex alode parentum, aut undecumque ad nostram pervenit dominatio-
 ‘ nem, et ad praesens possidere videmur, cum omni merito et termino suo, cum adjacen-
 ‘ tiis, adjunctis, appenditiis, cum terris, domibus, aedificiis, accolabus, mancipiis, vineis,
 ‘ silvis, campis, pratis, pascuis, aquis, aquarumve decursibus, farinariis, cum pastoribus
 ‘ gregis, peculia utriusque sexus majore, vel minore, mobilibus et immobilibus, vel quic-
 ‘ quid dici aut nominari potest, et tempore praesenti nostra videtur esse possessio ad
 ‘ praesens, Ecclesiae volumus esse concessum. Ita ut ab hac die, memoratam villam,
 ‘ pars antedictae Ecclesiae, vel Pontifex civitatis illius, aut actores Ecclesiarum, eam ha-
 ‘ bendi, tenendi, possidendi, vel quicquid exinde pro opportunitate ipsius elegerint faci-
 ‘ endi, libero in omnibus perfruantur arbitrio. Ita ut nomen nostrum in libro vitae
 ‘ conscribatur.

ted from them a deed, under the title of *precaria*, which came afterwards to make a very great figure in the business of land property all over Europe. It is the true parent of our back-tacks, improper wadsets, and other money securities. This *precaria* is supposed to be granted by the same persons, and respecting the same property mentioned in the former deed *. This deed is called *precaria*, because it proceeds upon the petition of the person who gets or continues the possession. On the other hand, the proprietor granted a letter, or *epistolae prelatiae*, which was nothing else than a liferent or lease for years. These deeds were afterwards confined to the transactions of the church, and were granted to people who made previous donations of their property; as a farther encouragement to which, the church very often made a small addition of some lands of their own in the *precaria*, or back-tack. The form itself is a very ancient Roman one; and with them the possession was resumable
at

* ‘ Domino sancto, et Apostolica sede colendo, Domino et in Christo patri illi Episcopo, ille et conjux mea illa. Pluribus non est incognitum, qualiter propter nomen Domini ad ecclesiam illam, in honore sanctae illius, villam nostram nuncupatam illam, sitam in pago illo, quicquid ibidem undecumque nostra possessio in integritate, per epistolam cessionis nostrae visi fuimus concessisse, et eam vos ad partem subscriptionis ecclesiae recepistis, sed dum postea nostra fuit petitio, et vestra benevolentia, et pietas habuit, ut ipsam villam dum advivimus, aut qui pari tuo ex nobis superstes fuerit, dum advivit, nobis ad beneficium usufructuario ordine excolendum tenere permisistis. Ea scilicet ratione, ut nihil exinde penitus de qualibet re alienandi, aut minuendi pontificium non habeamus, sed absque ullo prejudicio superscriptae ecclesiae, vel vestro, eam tantummodo excolere debeamus. Ideo hanc precariam vobis emitimus ut nullo unquam tempore nostra possessio etiam si spatium vitae nobis Dominus prolongaverit, nullum prejudicium at diminutionem aliquam de ipsa villa vobis generare non debeat, nisi usu tantum dum advivimus habere debeamus, et post nostrum ambobus discessum, cum omni re meliorata, quicquid ibidem undeque adtrahere aut meliorare poterimus, per hanc precaturiam, ac si semper per quinquennium renovata fuisset, absque ullius judicis, aut haeredum nostrorum expectata transitione, vos vel successores vestri, aut agentes ecclesiae, in vestram eam faciatis dominationem revocare perpetualementer possidendum, vel quicquid exinde facere legeritis, sicut nostra continet epistola, ad profectum profatae ecclesiae Domini illius liberum habeatis arbitrium. Facta precaria ibi.’

at pleasure, from which we have in law the title of *precarious possessor*. The church, fearing that length of possession might prejudice their titles of property, ordered all grants of that kind to be renewed every five years. To evade this regulation, a clause was devised, declaring them to be as good as if they were renewed.

When a grant of property was made, and tradition not given, it behoved the party to sue the heir before a judge, to deliver him the possession, as we are still obliged to do to an heir to make up titles where there is no authority for infeftment. In case, therefore, the continuation of the donee's possession, upon this title, should be troublesome after death, in obliging the church to get a new tradition from the heirs, it is declared by another clause, that they are to enter to the lands without the necessity of any second tradition, or *seisine*, (as we may call it), by the heirs.

We shall now endeavour to give an idea of the forms observed in taking possession of land property at this early period. If these are well understood, all the darkness and difficulty of after times will vanish in our progress. We shall, in the first place, examine the opinions of two writers who have treated of this matter in concert, and given us a very ingenious theory of its principles. 'Occupation (we are told by Lord Kaimes, in his *Treatise upon Property*) was necessary, in old times, to complete the transference of land property; for, if property was not thought to have an existence without possession, Occupation was necessary for transferring the property of land, as well as for establishing it originally. But, when property came to be considered as a right independent of possession, it was natural to relax from the solemnities formerly requisite in the transference of land property. It is often difficult, and always troublesome, to introduce a purchaser, with his family and goods, into the natural possession; and this solemnity was dispensed with, because not essential upon the later system of property. But then, in opposition to a practice so long established, the innovation would have been too violent, to transfer property by the bare will of the former proprietor,

' prior, without any solemnity, in place of possession. Such is our
 ' attachment to visible objects, that it would have appeared like ma-
 ' gic, or the tricks of a juggler, to make the property of land jump
 ' from one person to another, merely upon pronouncing certain
 ' words expressing will or consent. Words are often ambiguous,
 ' and always too transitory to take fast hold of the mind, without
 ' concomitant circumstances. In place, therefore, of actual posses-
 ' sion, some overt act was necessary in order to complete the trans-
 ' mission. This act, whatever it be, is conceived as representing
 ' possession, or as a symbol of it; and hence it has acquired the
 ' name of *symbolical possession**.' This is a common theory with
 the lawyers, but it is not consonant to the reality of things; and it
 leads to innumerable errors in the history of form. Symbolical de-
 livery was not introduced in opposition to the natural possession, or
 with an intention to supersede it. We find, indeed, that, in the law
 of Scotland, this effect came at last to be given to our infeftment or
 seilene. A purchaser, symbolically infeft, is under no necessity of
 entering into the natural possession; and hence arose all our securi-
 ties upon land; but these, comparatively speaking, are ideas of yester-
 day. Ages passed in all countries, and in our own likewise, be-
 fore what is now termed *civil possession* came to be understood or
 acknowledged. The original purpose of symbols was not to create
 this civil possession in the purchaser, but solely, by a visible act, to
 ascertain the will or mind of the seller in divesting himself of his
 property. This could not be done by the mere pronouncing of
 words, either in moveables or land; for though a man, with a
 moveable in his hand, should express his intention of conveying it,
 and yet with-hold his hand, the words would go for nothing; the
 actual delivery is the essence of the business. To have made land
 jump from one person to another, (as Lord Kaimes says), upon pro-
 nouncing certain words of will or consent, would be indeed a juggle-
 r's

* Law Tracts, p. 106.

‘ tempted with the greatest caution ; but, after the form became customary, there was less nicety in the choice. The delivery of a spear, of a helmit, or of a bunch of arrows, completed the transmission. In short, any symbol was taken, however little connected with the land ; it was sufficient that it was connected with the will of the granter *.’

How his Lordship would be able to prove, that the act at first chosen represented possession as near as possible, or that the change to an arbitrary symbol was attempted with caution, we do not pretend to know ; but we are entitled to observe, that the instance from Selden is altogether insufficient for the purpose. Among the great variety of articles anciently made use of in the transmission of property, it was very natural, and it could not but happen, that many of them should apparently relate to the land itself. We have heard, by the forms of Marculfus, that the common symbol of tradition or surrender of lands, was by a rod, in Latin *Festuca*. Now, it is plain that a rod has no visible relation to the possession of lands ; but it was not in the days of Marculfus, nor among the barbarians, that either the symbolical delivery, or the particular instrument of it, was devised. It was the common instrument of transmission among the Romans. But we come immediately to an instance which would have much better supported Lord Kaimes’s doctrine than the instance from Selden. It appears, that not long after the age of Marculfus, grants of land were made by a deed, in the form of an epistle, from the party ; in short, by a charter as it is now. This was undoubtedly a considerable innovation ; but as this letter was not granted, nor any act of the party passed, in presence of a magistrate, the transfer was not completed till such delivery took place ; and, therefore, it behoved the seller afterwards to appear upon the spot, and, in presence of the judge, deliver the lands by symbol to the purchaser. An instrument was written out, declarative of the fact, signed by the judge, and entitled ‘ *traditoria de terra, or de manso*.’

Instruments

* P. 107.

the analogy or resemblance of the thing sold, yet many more were equally in use without an atom of resemblance. Lord Kaimes accounts for this by telling us, that, when the form became customary, there was less nicety in the choice; *i. e.* the ideas of mankind became more refined: They could see the delivery of land in a spear, a helmet, a horn, or any thing. It may be asked, then, why, in Scotland, we returned, after ages of indifference in this article, to the choice of earth and stone for lands; corn and money for teinds; clap and happer for a mill; in short, to a set of fixed symbols, representing as closely as possible the properties conveyed? It is strange that we should have gone backward to objects of sense; for, according to the progress which his Lordship has laid down, the symbols of seifine should at last have been more indifferent and arbitrary than at any preceding period. Our ancestors, with great propriety, began to single out those symbols for the transference of property which had the nearest resemblance to it, and to exclude all others, precisely at the time when that kind of possession began, in law, to be held equal in effect to natural occupation; in short, at the time when our present ideas of the investment came to be established.

The distinction we have endeavoured to explain is a capital one in the history of our law, and the understanding of our forms. From thence we shall afterwards find the differences arise between the English and the Scottish system of securities. We therefore repeat it, that the transmission of land property by symbols was not introduced with a design of superseding the actual or natural possession; on the contrary, it was brought in to aid and support that possession. It was brought in, to show that the natural possession had been obtained by the free will of the former possessor, which, in many cases, could only be done by symbol. Hence both symbolical and natural possession were requisite; for the ancients knew no distinction in effect; nor had they any idea of a transmission of land which was not followed by the actual occupation of the purchaser. Consequently, the symbols of
delivery

delivery were for ages altogether arbitrary, and relative only to the will of the deliverer.

The History of Feudal Property is avowedly modelled upon the ideas of Lord Kaimes. Nothing can be more just, or better expressed, than what is said upon the evidence of transmission, in that Essay. 'It is not easily conceived, (says Sir John Dalrymple) among a rude people, how property can be transferred to another, so as to be vested in him, until there is evidence that the connection, as well as the affection of the former proprietor has ceased. The *emissio verborum* is not a proper medium to dissolve the corporeal connection between the proprietor and the subject, and much less to create a corporeal connection between that subject and another person. A different medium in conveying is therefore requisite, to wit, that of delivery. Delivery gives further evidence, likewise, that the affection of the conveyer is ceased; for, as it breaks his corporeal connection with the subject, it also carries the mind to connect it with another, and justifies that other in conceiving an affection for it.

'The first subject of property is moveables; and these, from the facility of moving them, were transferred *de manu in manum*. Again, when men came to transfer the next subject of property, to wit, immoveables, these were transferred by putting the intended new proprietor into possession, by placing him in or upon the subject itself. In the ancient borough laws of Scotland, it is said, if any one sell his house, the seller shall stand within the house, and come out of it; and the buyer shall stand without it, and enter. The same was the regular method of conveying a house anciently in England *.'

This form is much more ancient than the author suspected. It has been shown, that it existed 600 years before the borough laws of Scotland were heard of. On the other hand, it reached much farther down than he was aware of. We shall afterwards see, that it was the uniform

* P. 225.

form method not only of transmitting houses in boroughs, but all sorts of houses, castles, and fortalices in Scotland, down to the reign of Queen Mary, which, of consequence, occasioned a separate seifine for every messuage. This was a fact that could only be learned from charter chests, not from our law books; and it shows, that, while real possession remained possible, it was always joined to symbolical in one act: For, as noticed before, a house was capable of delivery in the same manner as a moveable, which lands, in most cases, were not. This is the reason why we have, at this moment, no symbols of seifine proper to a house. As the ceremony of the door came by degrees to be omitted, houses at last passed with the land; and the consequence was, that, when a person came to be infeft in a single house, the notary knew no symbol of it but earth and stone.

It is only further to be observed at present, that, amidst the number and variety of the symbols of transmission, the *festuca*, as it was the first, so it continued to be the fixed mark of the cession or transmission of laws; and, though many others were used, it was seldom omitted. *Festuca* was the praetor's rod, which he used in manumissions; and therefore the delivery of it denoted power over the property, what the Romans termed *dominium*. The rod or baton, in all ages, has, and still continues to be, an emblem of power or command. It was therefore an excellent symbol in the transmission of allodial land: It denoted the transmission of power or dominion. But it did not so well suit the feudal resignation, when the person who received it was already superior or *dominus* of the thing resigned. Like the other symbols, however, it was retained without alteration; and the incongruity can only be thus accounted for.

The styles of Marculfus are succeeded in our progress by the real charters and other deeds of the Princes and nobility of Europe, which although altered by posterior usages, evidently bear strong marks of the originals from which they were taken. The forms of transmission, from the time of Marculfus, continued to be the same almost over all Europe. The formation of deeds, and every thing relating

relating to them, were in the hands of one set of men, who, confined within their cells, had no opportunity of seeing the world, but adhered religiously to the letter of form transmitted to them by their forefathers. The only difference that is to be found, lies in the prefaces or exordiums of the deeds, the singularity of execrations against contraveeners, and in the degrees of the barbarity of the style, which becomes evidently purer towards the end of the reign of Charlemagne, and falls again with his successors. These charters are signed by crosses, marks, and signets. Some commence with invocations. Some are dated with the day and the month,* and the years of the incarnation. Others have the date in the Roman form; mention the kalends, the indiction, and the year of the reign of the present King. These grants appear all to be given to the church for the salvation of the souls of the granters, their predecessors, and their posterity. The specification of the parts and pertinents are exactly similar to the styles of our monkish conveyancer. Pepin King of France is the first who uses the *formula*, ‘By the Grace of God.’ He was an usurper, and it was thus he accounted for his success; and Charlemagne, while King of France, followed the form of his predecessors. But, after the conquest of Lombardy, he entitled himself, ‘Carolus Gratia Dei Rex Francorum et Longobardorum, ac Patricius Romanorum.’ Charles, who restored an empire in the west, was fond of those titles which formerly belonged to old Rome. From his charter in the year 775 to the abbey of St Dennis, he conjures the monks to celebrate a mass every day for himself, for his children, and for the prosperity of the kingdom of the Franks. The words are *, ‘Ut eas semper melius delectet pro nobis vel filiis nostris seu pro stabilitate regni Francorum die noctuque incessabiliter orare, vel Domini misericordiam deprecare; et sicut nobis promiserunt, per singulas dies nomen nostrum tam in missis, quam et in peculiaribus eorum orationibus, ad sepulchrum ipsius Sancti Dionysii, debeant recitare.’ In this clause may be perceived

* Vol. 5. p. 689.

perceived the beginning of the tenure in mortmain, or, as we say, mortification, and in what manner the preceding forms of deeds were accommodated to the feudal system. The charter of Charlemagne is a simple donation to the church, with a request of their prayers and blessings in return. This was afterwards converted into a feudal tenure; and the request of the donor was converted into a *reddendo* of *preces et lachrimae*. In the library of the King of France, there is a beautiful diploma granted by Charles the Great, Emperor of Germany, in the year 886, part of which is lately published by those learned diplomatists the Benedictines. It begins in this form: ‘In nomine Sanctae et individuae Trinitatis, Carolus divina favente clementia Imperator Augustus.’ Then follows the exordium, and the grant to the church, in the common style. In the remainder of the charter, very considerable alterations are perceptible*. Here the prayers of the church are made a positive condition of the grant: ‘Eo videlicet tenore.’ Besides, the church is bound to the real return or *reddendo* of an annual feast upon the anniversary of his coronation in all time coming. This plainly indicates the existence of the feudal forms, which had made a considerable progress, and were completely established upon the subsequent ruin of the empire of the Franks, and the rise of the Seigneuries. The imprecations, and the rest of the style, continued much the same. Charles the Bald, in the year 862, granted a charter to the abbey of St Dennis, which contains the following execration:

‘Qui,

* ‘Eo videlicet tenore, ut pro nobis atque antecessoribus nostris, et conjunge ac prolo nostra, seu totius Imperii nostri stabilitate, Dei clementiam haec eadem ecclesia assidue exoret, et annis singulis, die consecrationis nostrae, congregatione ejusdem ecclesiae, et monachis in monasterio jam dictae Abbatiae Sanctae Mariae et Sancti Sequani, Deo famulantibus, una refectio nobiliter preparetur et honorifice exhibetur: Post nostrum quoque ex hac vita discessum, dies anniversarii nostri, cum precibus et orationibus missarum, devotissime recenseatur, et haec eadem refectio eisdem congregationibus absque aliqua relaxatione administretur. Et ut haec nostra concessio firmiorem per futura tempora in Dei nomine obtineat vigorem, et a fidelibus nostris verius certiusque credatur, manu propria subterfirmavimus.’

* Qui, vero, nostro tempore aliter facere praesumpserit, et post dis-
 cessum nostrum, sive quamdiu advixerimus, hanc nostram confir-
 mationem violare voluerit, a Deo, cujus extitit contemptor, poenis
 ' eternalibus se damnandum cognoscat *.' About the end of the
 tenth century, and beginning of the eleventh, the universal disorders
 which prevailed in Europe from the relaxation of government, and
 the great variety of petty Princes, as it ruined almost every thing
 else, bore very hard upon the church. The possessions of the clergy
 were of all others the most tempting; and, as every lord or baron
 wanted to increase his domain, he made no scruple, especially in
 Germany, of appropriating now and then a part of the ecclesiastical
 possessions. The clergy had nothing to oppose against these vio-
 lences but spiritual curses, which they inserted into every charter and
 deed which came through their hands, insomuch that these imprecations
 came at last to be a fixed clause of style, although they proved
 but a weak defence against the attacks of their ferocious neighbours
 the laic nobility.

When the empire of the Franks came to be dismembered among
 the Counts, Dukes, and Princes, each of them, as they affected every
 thing that was royal, assumed also the title and the style which
 formerly belonged to Sovereigns alone. In Mabillon †, there is a
 charter by William Count of Auvergne, and Duke of Aquitaine, to
 a monastery of his own founding. It is directed, ' Sacro sanctae
 ' ecclesiae Sanctae et individuae Trinitatis, Sanctaeque et intemera-
 ' tae Virginis Mariae, Ego Gratia Dei, Princeps et Marchio Willi-
 ' elmus.' Another, by Hugh Duke of Flanders ‡, begins thus:
 ' In nomine summi et eterni Salvatoris Jesu Christi, Hugo Excel-
 ' lentissimus Rex Francorum, Dux et Marchio.' And thus Rich-
 ard I. Duke of Normandy, introduces his charters of religious do-
 nations: ' In nomine Sanctae et individuae Trinitatis, Ego Ricar-
 ' dus, Gratia Dei, Dux et Princeps Normanorum, penas inferni cu-
 VOL. II. N ' piens

* Diplom. vol. 5. p. 710.

† P. 559.

‡ Mabil. p. 723.

‘piens effugere,’ &c. These were the origins of those titles which the feudal nobility afterwards arrogated to themselves*.

In the eleventh century, charters appear without any subscription or seal. The notary only names himself, inserts the names and titles of all the witnesses, and concludes with his own name thus, *Petrus Monachus scripsit*; or *rogatus scripsit*. In general, charters of all kinds were signed by crosses made by the parties; but the words were always written around them. The style of charters and deeds, in general, respecting property, with the mode of their execution over all the Christian world, varied in nothing material: The forms are all substantially the same, and have been handed down from the same models. The alterations, such as they are, seem to arise from the temper or degree of superstition of the granters. For example, in a charter of Sancho King of Arragon, he thus designs himself: ‘Nunc igitur, Ego humillimus servorum Dei servus, Dono Dei, Sanchus Rex.’ In the year 1085, Alphonso of Spain begins with the most solemn and orthodox invocation: ‘In nomine Domini, qui est trinus et unus, Pater et Filius, et Spiritus Sanctus; Ego Alphonfus Dei Gratia,’ &c. William Duke of Normandy, on the contrary, at an early period seems to have thought the invocation of no consequence. He begins, ‘Willielmus Dei Gratia, Dux Nor-manorum, omnes ad quos literae istae pervenerint Salutem, Sciant tam presentes quam futuri.’

The great variety in the dark ages of which we have been speaking, in the mode of the execution of all sorts of writs respecting property, arose from the general ignorance of letters, and particularly of the art of writing, which was long confined either entirely
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* Charters are found at this period having the testing clause in barbarous verse. Such is that granted by King Rollo to the Abbey of St Amond in the 925.

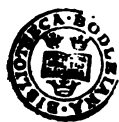
Utque hoc preceptum firmum per saecula duret,
Et credant homines cuncti per tempora mundi,
Subsignante manu propria firmatio patet,
Atque annulus nostrum pinxit suppressus agalma.

to priests or to notaries, in whose hands it was then considered just as any particular art, such as that of engraving is with us at this moment. Therefore it was, that among the Romans, in their decline, people of distinction, officers of rank, nobility, and Princes themselves, made no scruple of declaring their want of this art in their deeds; for, had it imported any reflection, the notaries never would have ventured to insert an acknowledgement of that kind. This practice continued during all the succeeding ages; and it is ascertained by a vast variety of instances to be found in the diplomatic writers during the long period from the ruin of the Roman Empire to the 11th century. Thus Clovis II. of France, and Nantchild his mother, scrupled not to say, 'Propria subscriptione inferere non possumus, nos et procelsa genetrix nostra.' And, what is more surprising, Bishops themselves seem as little concerned about this circumstance, as appears from several private deeds and public councils. For the same reason, the symbols of tradition varied continually, according to the caprice of the party. Although, for a long time after the ruin of the Empire, writing seemed to have been necessary in the transmissions of property, they came at last, for the most part, entirely to depend upon the ceremonies of tradition, and the witnesses present; though, at the same time, in a variety of important cases, instruments continued to be made out upon the fact, bearing the same title they had in the days of Marculfus, viz. *notitiae traditoriae* and *guerpitiones*, which answer to our *resignation* and *investment*. The one is the act of the proprietor abandoning the possession, and the other of the purchaser entering into it; and these are often joined together. The strength of the transaction being thus made to depend upon the ceremony of investiture, witnesses, oaths, and religious restraints grew more and more into practice; a practice which contributed very much to increase the influence of the clergy, and throw the civil business of Europe into their hands.

The forms of the feudal law then growing into system, continued the transmission of property, without writing, upon different principles.

ples. With that law also, the old obstructions to alienation began again to appear, and were soon joined by a great number of additional restraints, till then unheard of in the world. Accordingly, several charters in the tenth age are to be found, in which the children consent to the conveyances of their fathers.

The principal symbols of tradition continued to be the *festuca*, baston, or rod; the turf, or the bough of a tree, for land; and for houses, the door, or actual possession; but a great many others were used at the same period. Du Cange, in that prodigious repository of learning, the *Glossarium Mediae et Infimae Latinitatis*, has collected a list of above sixty different things used as symbols of the tradition of real property. Sometimes the granter, when writing was to intervene, gave his orders symbolically, and delivered the parchment, the pen, and the inkholder, before witnesses, to the writer or notary who was to act upon the occasion. This was a very common practice; and it is the original of the ceremony yet observed by a person who cannot write, who delivers the pen to the notary, or touches it. The bough and the turf are generally introduced in these words, ‘Cum ramo et cespite rituque populari idem sancitum est, rationabiliterque firmatum.’ These were very common or popular symbols; at other times a very odd one appears; a cask of sea water for lands upon the coast; ‘per amphoram plenam aquae maris exinde legitimam fecerit donationem;’ at other times the rod appears to be a knotted stick; and sometimes the ceremony is performed by a cloth and a knife. In a deed of excambion, granted by Sisenand a French Lord, to another proprietor about the end of the ninth century, the tradition of the land is thus expressed: ‘Et juxta legem meam, per cultellum, et festucam nodatam seu guafonem terrae vobis exinde ad vestram partem corporalem facio vestituram ad vestram proprietatem habendum, et me exinde foris expuli, et ab sacito feci a presenti die.’ He delivers the property of the land by the rod, the knife, and the turf, which is to serve for a corporeal investiture thereof; at the same time he gives instant possession of the house, by going out of the door,



door, and declaring that the purchaser might do with it what he pleased. Having thus disfeised himself, (as he says) he takes up the parchment, pen, and ink, delivers them to the notary, and desires him to make out an attestation of the whole act: 'Dixi et pergamina cum atramentario, de terra elevans, Ariperto notario domini imperatoris tradidi, et scriberè rogavi *.' On purpose that the witnesses might be attentive, the party, in these days, pulled each of them by the ear, after which they were said to be *rogati et requisiti*. The words are, 'Coram multis testibus, per aurem attractis †.' This instrument of seifine is as complete as any one that has been executed since that time, and is the first deed in which we meet with the barbarous verb *seifire*, or *inseifire*, which had now become technical. The ceremony is very particularly specified in an instrument of restitution of lands, which Guido, Count of Piccardy, had taken from a monastery of the Holy Trinity in that country, and which he had afterwards been prevailed upon to restore. It is dated the 8th of the kalends of June, anno 1068, about two years after the Norman conquest ‡. According to the principle of the Books of the Feus, which are said at this period to have come abroad, a violent seizure from the proprietor would have been construed only as an interruption of the possession; but that was not the case in France at this period. The same observation which we set out with, in explaining the nature of the seifine in the time of Marculfus, is applicable to this deed in the middle of the eleventh century. Every
resignation,

* Dip. vol. 5. pag. 729.

† Ibid. pag. 698.

‡ 'Vobis et omnibus aliis ab hinc inantea permitto, concedo, et ad integrum restituo, terras easdem et cetera omnia cum omnibus pristinis consuetudinibus, sicut ipse et mater mea cum illo tenuerunt; et monasterio Sancti Trinitatis dederunt; ut habeatis et teneatis firmissimo stabilimento vos et posteri vestri. Tunc inclinavit se comes et accepit viridum Sciapum, nam domus recenter erat juncata, sicut solemus facere, quando aliquem persona potentis vel Dominum suscipimus, vel amicum. Tunc junco ipso, nam tam donum faciens quam restaurationem, dedit duobus fratribus qui presentes aderant; id est Domino Claro et Fratri David,' &c.

resignation, and every tradition of property, whether symbolical or real, was considered to be complete, and to leave nothing in the person of the grantor or donor, who was held to be absolutely denuded or divested, and the other to be completely invested. They had not the most distant conception of the existence of property without possession. On the contrary, these ideas, in the times we have been considering, have always been inseparable.

As a certain proof that the Roman law never was forgot during all these ages, and that the forms of it were adopted into the feudal system, we have only to remark, that the Roman form of stipulation was kept up and observed in the greatest part of the transactions both of Italy, France, and Germany; and that most of the deeds, from the days of Marculfus downwards, expressed the ceremony of the stipulation to have been performed. The words are, '*stipulatione subnexa.*' To understand this expression, it is necessary to know, that the Germans and Franks, like the ancient Romans, in token of a promise or an obligation, broke some straw or rushes; and, by the deed last under consideration, we see, that a bulrush was one of the symbols of the delivery of real property. The party receiver tied this straw or rush to the instrument of obligation, as an additional proof of the perfect completion of the act, which, upon that account, was said to have a stipulation annexed. As a monument of that form, there yet remains the testament of Fulrad Abbot of St Dennis, as we are told in the New Diplomatic Treatise by the learned Benedictines, which has the straw remaining glewed to the paper. In the same manner, lands were conveyed at times by a piece of money, delivered by the seller or donor to the donee or purchaser; and this piece of money was tied like a seal to the charter. The words of one of these are: '*Et in testimonium hujus donationis nummus iste huic cartae apensus est, quum per ipsum donationis ista facta est.*' *

Having

* Dip. vol. 5. pag. 517.

Having thus endeavoured to give an idea of the deeds, usages, and manners, in the transmission of property, from the ruin of the Roman empire in the west, till the publication of the Books of the Fiefs, and the Norman conquest, both of which happened about the middle of the eleventh century, we propose, in the next place, to complete the history, by the addition of the forms of the Saxons and Normans, which brings us home to those of our own country.

No man has treated this subject with such depth of knowledge, and, at the same time, with such plainness and simplicity, as the learned Sir Henry Spelman. His mode of writing is entirely free from affectation, and suited to the calm disquisitions he engages in. Sir Henry, in his Glossary, under the word *feodum*, refers the origin of the feudal law in England to the Norman conquest. This point of the history of the law came to be argued in a great cause, respecting defective titles, in Ireland. It was contended by some, that Spelman was wrong, and that the feudal tenures existed among the Saxons. This called upon Sir Henry to defend his opinion, which he did with the greatest success, and, at the same time, threw a great deal of new light upon the laws and antiquities of his country. From the account which this author gives of the Saxon deeds and instruments, it is evident that their usages were very little connected with, or founded upon, the feudal law, its principles, or its tenures. The Saxons came to Britain at an early period, before the feus had made any visible progress upon the Continent. It is plain, that, in the matter of land rights, and in the forms of their written deeds, they adopted the same models and usages which existed among the inhabitants of Italy, France, and Germany. Spelman's account of this matter is so satisfactory, that we shall give it in his own words:—
“The Saxons, in their deeds, observed no set form, but used honest
“and perspicuous words to express the thing intended, with all brevity, yet not wanting the essential parts of a deed, as the names of
“a donor and donee, the consideration, the certainty of the thing
“given, the limitation of the estate, the reservation (if any were),
“and;

' and the names of the witnesses, which always were many, some
 ' for the one part, and some for the other; and though the deeds of
 ' their time, which we find in abbey books, are generally Latin, yet
 ' are most of them translated from the Saxon by religious men; for
 ' they ordinarily did use their vulgar, as appeareth from the inspexi-
 ' mus of many ancient charters, and by diverse originals themselves,
 ' at this day extant. Monks and clergymen affected much the La-
 ' tin, as well to make themselves the more remarkable for their
 ' learning, as to express works of sanctity in a sanctified tongue.
 ' Therefore, also in donations made to their churches, they used for
 ' the most part long and tedious preambles to excite the donor, and
 ' advance the action, with all the powers of invention, wit, and
 ' learning, that they could. Their deeds made to churches and reli-
 ' gious uses, commonly contained in the end of them a bitter curse,
 ' denounced by the donor, (and some bishops that confirmed the
 ' same), against all that should at any time pervert the intent of the
 ' donor, or interrupt the quiet possession of the thing so given.
 ' Where the King was donor, the ancient deeds did usually recite,
 ' that the gift was made by assent of the peers of the land; the law
 ' seeming to be then, that the King might not dispose the lands of
 ' his crown without the assent of the lords, both ecclesiastical and
 ' temporal. Therefore, when Baldredus, King of Kent, had, with-
 ' out the assent of the nobility, given the manor of Mallinges in
 ' Suffex to Christ Church in Canterbury, the gift was avoided till
 ' King Egbert, and Ethelwulf his son, (by a general council holden
 ' for all England, at Kingston, about the year 838), did new grant
 ' the same to them. Hence it seemeth to grow, that so many peers
 ' of the land always subscribe the charters of the ancient kings, not
 ' only as witnesses, but as consenting to the same, by the words, *con-*
 ' *sensi, confirmavi, corroboravi, consolidavi, amendixi*, and such like;
 ' every one of them commonly using a several term, and adding the
 ' sign of the cross + to his name *.'

Sir

Sir Henry did not, in the foregoing account, intend to establish any connection between these usages of the Saxons and the people of the continent; and yet we must be sensible, that what he has said is almost a summary of what we have been endeavouring to establish from the earliest charters on the continent; the same long preambles, to excite the piety of the donors; the same bitter curses against those who should counteract the intention of the deed; and the same mode of subscription by the cross, in presence of numbers of witnesses, which, in the case of the King, consisted of the first nobility. 'As for dateing, (says Sir Henry), it was not usual amongst them, save in writings touching the church, wherein they followed the chamber of Rome in kalends, nones, in the year of the Lord, and sometimes of the Pope. Seals they used not at all, other than the common sign of Christianity, the sign of the cross, which they and all nations, following the Greek and Roman Church, accounted the most inviolable method of confirming.'

This is so true, that the Christians of the third age who used seals, had the sign of the cross cut upon them. Clemens of Alexandria particularly exhorts them to use only figures proper for calling to their remembrance the mysteries of the Christian religion, and discharges the seals used among the other people, such as arms, vases, and other figures. It was customary for councils to confirm their decrees and regulations by the sign of the cross, which, from that form, obtained additional force and respect; and the Emperor Leo, surnamed the Philosopher, is said to have made a decree, bearing, that all deeds sanctified with the sign of the cross should be inviolable. 'It is (continues Spelman) to be understood, that the elder Saxons made their conveyances of lands without deed or writing, by delivery of a turf or spear, a staff or arrow, or some other token or symbol thereof*.' In this manner St Edward the Confessor granted to the monks of St Edmund the manor of Brok

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by

* Feuds and tenures, p. 8.

by a knife, which he fixed upon the high altar of the abbey, there to remain *in perpetuam memoriam duraturam*. To this we beg leave to add, that horns, either made for drinking or hunting, seem to have been, in the Saxon times, the principal symbol of delivery in the grants of lands. We mentioned, on a former occasion, the famous horn kept in the cathedral at York, by which Ulphus King of Deira conveyed his estate to that church. The family of Puse, in Berkshire, hold a particular manor by a horn, which was given to their ancestor William Puse by Canute the Dane. Upon this horn there is an inscription in these words: 'King Cnute gave William Puse this horn, to hold by thy land.' Dr Hickes informs us, that 'both the horn and the manor were in his time possessed by Charles Puse, who recovered it after a long suit in Chancery before Judge Jefferies.'—'The horn itself was produced in Court, and, with universal admiration, received, admitted, and proved to be the identical horn by which the lands, as by charter, had been conveyed by Canute the Dane seven hundred years before.' There is another horn of this kind which was preserved by the lords of the manor of Boarstall, as having been given by Edward the Confessor to one of their predecessors, named Nygil. It is now in possession of the English Society of Antiquaries. There was an inquisition taken about it in the year 1268, in the following words: 'Praedictus Willielmus filius Nygelli et antecessores sui tenuerunt dictas terram et Ballivam de Domino Rege ante tempus Conquestus Angliae per *unum Cornu*, quod est *Charta* praedictae Forestae *.' As the greatest part of the laws on the continent, especially such as the church had concern in, were conveyed by written deeds, supported by delivery, real or symbolical, or both; so we find the very same practice early established among the Saxons.

'Touching lands (says Spelman) among the Saxons, they were of two sorts, *bocland* and *folkland*. *Bocland* signifieth *terram codicillarum*, or *librariam*, charter lands; for the Saxons called a deed

or

* Arch. vol. 3.

or charter *an boc*, i. e. *librum*, a book ; and this property was their *terra hereditaria* ; for it commonly carrieth with it the absolute inheritance or property of land, and was therefore preserved in writing as *predium nobile liberum et immune* *. *Folkland* was the *terra vulgi*, the land of the common people. It was so termed either for that the assurance of them rested in the testimony of the folk or people, or for that they might be alienated to all folk without impediment. As the other, in writing, was termed *bokeland*, for that they were no way disposible but according to the tenor of the writing, which they called a *boke*, or *land boke*, as the Jews called their writings the *possession boke* ; so that *folkland* and *bokeland* among the Saxons were much of the nature of *allodium* and *feudum* among the feodists. But as nothing continueth stable under the sun ; so, in proceſſion of ages, this bokeland, or heritable land, began by little and little to be aliened by the fathers first to churches and religious houses, by consent of the next heir ; then by exciting the children and kinsmen, out of piety, to confirm their fathers and ancestors grants. After, in like manner to lay persons ; so that it grew at last a matter of course for children, as *heredes proximi* ; for kinsmen, as *heredes remotiores* ; and then the lord himself, as *heres ultimus*, to confirm the same.

The use of writing, in conveyance of land, did not, among the Franks or Germans, supersede or even diminish the ceremonies or the symbol of tradition. It was about the middle of the seventh age that the Saxon Kings converted to Christianity began to use written deeds in their donations to the church. To complete the transmission, or, as it is there expressed, to confirm their own grant, they offered a turf at the altar. An instance we have of this in the early charter of Cedwalla, King of the South Saxons, made to Theodore Archbishop of Canterbury. This is the only case of symbolical tradition quoted by Lord Kaimes from Selden, in the Tract upon Property. The words are : ‘ For a further confirmation

* Feuds and tenures, p. 12.

' my grant, I Cedwalla have laid a turf of the land aforesaid upon
 ' the holy altar of my Saviour ; and with my own hand, being ig-
 ' norant of letters, have set down and expressed the mark or sign of
 ' the Holy Cross.' The testing clause is, ' Anno Dominicae incar-
 ' nationis sexentesimo octogesimo, Ego Cedwalla, Rex a prefato ro-
 ' gatus Episcopo, hanc donationis meae cartulam scribere jussi.' The
 same charter is also cited by Blackstone *. ' The method (says he)
 ' of the Saxons was, for such as could write to subscribe their
 ' names ; and, whether they could write or not, to affix the sign of
 ' the cross ; which custom our illiterate vulgar do, for the most
 ' part, to this day keep up, by signing a cross for their mark, when
 ' unable to write their names. And, indeed, this inability to write,
 ' and therefore making a cross in its stead, is honestly avowed by
 ' Cadwalla, a Saxon King, at the end of one of his charters.' This
 practice, however, was not peculiar to the Saxons ; nothing was
 more common upon the continent, both among Kings and subjects,
 from the ruin of the Roman Empire downwards. The custom, too,
 of offering lands at altars by symbols is equally ancient, and equally
 common. Charles the Great presented his charter of donation of
 the island of Corsica, and the dutchy of Spoleto, upon the altar,
 to St Peter, and to Pope Adrian. The charters, completely exe-
 cuted, were laid upon the altar as offerings made to God. Some-
 times these charters were sent to Rome, to be offered upon the altar
 of St Peter, and preserved in the archives of the church ; and dona-
 tions of that kind were frequently confirmed by the Pope, as the
 head of the church. It was formerly observed, that the children
 and heirs of the granters were accustomed to consent to them, as
 having a right in the succession of the property. For the same rea-
 son, the wife and children joined in the religious act of offering the
 charter of donation at the altar. All these practices continued to be
 common upon the continent down to the twelfth century. Gui,
 Lord of Montelheri, one of the greatest men at the court of Philip I.
 of

* Vol. 2. p. 305.

of France, in the fuperftitious fpirit of the times, became a monk in the monastery of Longpont. At his entry, he made them a donation of a valuable mill and mill-land, called Grotel; and his wife and his children appeared in the church, and laid the deed of donation upon the altar with their own hands *.

The later Saxon Princes, as a further mark of their religion, besides figning by the crofs, placed it at the top of their charters, sometimes with the addition of the famous *monogram* or *labarum* of the Emperor Constantine. This *monogram*, composed of the letters of the name of Chrift, came afterwards to be much in ufe among the Chriftians in feals, in writings, and in ftandards.

We fhall now proceed to confider one of thefe Saxon charters,† by Uchtred King of Canterbury, in the eighth century, which has (as Spelman obferves) all the effential parts of a complete deed. It has the confideration, or, as we fay, the caufe of granting. It contains a defcription, (as the Englifh fay), and a certainty of the thing granted; neatly defined by all its boundaries; and the granter's heirs, and every other perfon, are to incur an anathema if they prefume to counteract the deed. This is the fubftance of all the charters upon the continent for the long period we have examined; but the expreffion is more concise, and at the fame time equal in ftrength. After the heptarchy was deftroyed, and England united under one head, the ftyle of the charters became almoft literally what they were

* Dip. vol. 5. p. 494.

† In nomine Domini Dei nostri Jefu Chrifti, Ego Uchtredus Rex Cantuariorum, providens mihi in futuro, decrevi dare aliquid omnia mihi donanti, et concilio ac-
cepto bonum vifum eft conferre Basilicæ Beatae Mariae Genetricis Dei, quæ fita
eft in loco qui dicitur Limingæ, terram quatuor aratrorum, quæ dicitur Wilhelme-
ftun, cum ad eandem terram pertinentibus, juxta notiffimos terminos, id eft Berewig
et Meguines Paes et Stretleg. Quam donationem meam, volo firmam effe in perpe-
tuum: Ut nec Ego, nec hæredes mei, aliquid minuere prefumant. Quod fi aliter
temptatum fuerit a qualibet perfona, fub anathematis interdictione fcias fe praevari-
cari. Ad cujus confirmationem, pro ignorantia literarum + fignum Sanctæ Crucis
exprefsi, et testes idoneos ut subscriberent rogavi, id eft Berichtwaldum Archiepifco-
pum virum venerabilem.

were upon the continent, and even what they were in the days of Marculfus, excepting that the curses against the contraveeners are more terrible. In short, any man would be led to believe, that all the churchmen, chancellors, and notaries in Europe, had copied from the same style-book for hundreds of years*.

The words of style, or the *habendum*, (as we shall term it), are the very same with the forms of Marculfus. Lands are granted in that ancient author to a purchaser, ‘*Ita ut eam jure proprietario habeat, teneat, atque possideat, et suis posteris aut cuicumque voluerit ad possidendum relinquat.*’ The lands are to be possessed in the same manner, and disposed of with equal freedom, at the pleasure of the grantee, ‘*ut habeat ac possideat quamdiu vivat, et post se unum haeredem vel cuicumque sibi placuerit, derelinquat.*’ The only condition or burden in the Saxon charter is, the performance of what was the duty of all the subjects of the kingdom, viz. the *trino-da necessitas*, which is the duty of going to war, or military expeditions, and the building and repairing of castles and bridges, to which all men were liable, whether they had lands or not; only, those who had lands were chargeable in proportion to their property. This duty is therefore excepted in these words: ‘*Excepto communi labore, expeditione, arcis et pontis constructione.*’ The specification of the pertinents are the very same with those of Marculfus, ‘*cum omnibus*

* A charter of King Edgar in the year 958. proceeds thus: ‘*Regnante in perpetuum Domino nostro Jesu Christo, &c. Ego Eadgarus Rex Anglorum ceterarumque gentium in circuitu persistentium Gubernator et Rector, cuidam fideli meo ministro, vocato nomine, Alur. modicam muniminis mei partem, terrae et tres perticas in illo loco, ubi Anglica appellatione dicitur, at Louk ut habeat et possideat quamdiu vivat, et post se, unum haeredem, quicumque sibi placuerit, derelinquat. Sit hoc praedictum Rus liberum ab omni malorum obstaculo, cum omnibus ad Rus rite pertinentibus, campis, pascuis, pratis, silvis, aquis, aquarumque decursibus, excepto communi labore, expeditione, pontis et arcis constructione. Si quis vero hominum, hanc meam donationem cum stultitiae temeritate jactando, infringere tentaverit, sit ipse gravibus percolla depreffus catenis inter flammivomas tactrorum daemonum catervas, nisi prius ad satisfactionem emendare voluerit.*’

vision of its history by the feudal writers, and by Sir Thomas Craig among the rest, into infancy, youth, manhood, and old age. In England it was otherwise. Though certain that the feudal principles and ideas might have made their way from the Continent, especially in the time of their connection with the Normans under Edward the Confessor, yet it is held by the best informed writers and historians, that a revolution took place in England, in favour of the feudal law, under William the Conqueror. In the time of this Prince, the system of the fiefs, upon the Continent, had arrived at full manhood. He invaded England in the year 1066, and feudal lands had been hereditary, and held under a new polity in France, ever since the usurpation of Hugh Capet in the year 998; and in Germany, from the expedition of the Emperor Conrad to Italy, which was only a few years afterwards. It is not to be supposed, however, that this revolution was altogether sudden. The Conqueror was a Prince too politic to make an attempt of that kind. It required time to settle the kingdom, and to confirm his own power, before treading under foot, as he at last certainly did, the ancient laws, liberties, and customs, of the Anglo-Saxons. In the mean time, these usages, especially in the transmission of land property, continued. Ingulphus, Abbot of Croiland, the historian of William, informs us, that, at the time of the conquest, many estates were transferred by bare word of mouth, without any writing or charter, and only by the Lord's sword, helmet, horn, or cup; and many tenements by a spur, a bow, and some by an arrow. These things happened in the beginning of the Norman reign. In after times, the author observes, that the fashion was altered. With regard to written deeds, they also continued after the conquest the same as before, even in the mode of execution; being signed by the granters with the cross; and the writer added the name of the person who granted it. 'This use (says Spelman) continued also after the conquest, as appeareth by many precedents, both of the Conqueror himself, and some of his successors. So, when Henry I. gave the manor of Thorpe to the

the church of Norwich, a dozen of Bishops, and above twenty Earls or Barons of the laity, and as many Abbots and other prelates, subscribed the same; adding thereto, with their names, the sign of the cross; and I much marvel that it hath no curse annexed.—And for this cause, after the Normans had brought in the common use of sealing, yet they did long after retain the former custom, and so fortified their charters, both with crosses and seals, as was that of Henry II. and others I have seen, of William the Conqueror, William Rufus, King Stephen, &c *.

From the Norman invasion, until the reign of Edward II. the forms of the charters, and other deeds in England, continued in an unsettled state. This is a natural consequence of the situation of the kingdom, of which the inhabitants were now mixed with, and subjected to a foreign nation. The alterations, however, upon the state of land, and the forms of its transmission, were neither violent nor sudden. The plain ancient Saxon forms of written deeds remained; which, from the ruin of the empire, till that period, contained plain declarations of the fact, or of the intention of the donors, without any fixed arrangement of words or clauses. By degrees, however, the technical words formerly used to indicate the freedom of the grant, viz. the words *habeat, teneat, possideat, &c.* came by degrees to be changed into *habendum et tenendum*; and the holder or grantee was termed a *tenant* or *vassal*. The word tenant, formerly, meant no more than a freeholder or possessor. Formerly, the granter, seller, or donor, had no further concern with the lands; but now they were to be held of him as superior lord. Hence they came to be termed *tenementa*; and then, and not till then, the *reddendo*, or return to be made by the tenant, appears upon the face of the deed. Formerly, the consideration, or the cause of granting, was expressed to be either a price, or for services past or present; but deeds, after this period, became frequent, where the consideration always re-

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spected

spected the future; and therefore, the lands are granted, not as formerly, 'ut sint liberae vel immunes a servitute mundana;' or, 'ab omni seculari gravedine,' but are expressly given 'pro homagio et servitio habendo;' for military service; and for a great variety of *reddendas* relative to the manners and commerce of men at the time; especially for the prayers and devotions of the church.

By the old Saxon charters, the donee was entitled to convey them 'cuicunque voluerit;' but now, restraints of all kinds begin to appear. Sometimes the vassal is laid under express obligation not to alienate, without the licence of the lord or superior; and, in general, the law came to be so understood, though the form was not thereby much affected; and, indeed, it appears, that, for several reigns after the Norman conquest, a great number of charters continued to be given, with the ancient freedom, to heirs and assignees; to the grantee, and the heirs appointed by him; and for very small, or elusory payments and services; but this does not apply to the great body of the national property, which certainly, by degrees, came to be converted into knight or military services. At last, in the reign of Edward I., the style of the feudal charter was fixed, and divided into so many specific clauses; which form it has retained both in Scotland and England ever since.

In Scotland, our earliest charters, from the days of Malcolm Canmore downwards, are in the same style, or rather in the same words, with the Saxon and early Norman deeds; or, which is the same thing, in the very style and words of the ancient charters of the Continent. The reiterated confirmations by our Princes, of the deeds of their predecessors in favour of the church, or private persons, were merely for the purposes of security and notoriety. They are termed *precepts, letters, charters, &c.*; exactly as those of the Princes of the Continent, and of their Saxon neighbours. At last, the modern clauses, the *tenendum et habendum*, begin to appear, verging always towards a fixed style, which they at last received about the very
same.

being a dry index for the memory, we have therefore thought it proper to go as far back as any thing in our department is to be found in Europe. We have accordingly given the history of the several nations through whom the substance of our forms has been transmitted, and have traced the several forms themselves down from the ruin of the Roman empire, to the establishment of the feudal law in Great Britain: We demonstrated, that the forms of transmission of property, which have always been considered as originating from the feudal law, were in fact the fixed forms used among the Romans of Gaul at the destruction of the Western Empire, and which were handed down entire in all their ceremonies, clauses, and technical terms, from that remote period to the conquest of England by William the Norman, and which have reached, in a great measure, to our own times; therefore, we have ventured to assert, that the forms, styles, and technical terms, of the charters and transmissions of Roman property, were afterwards appropriated by degrees to the language of the fiefs; and by an alteration in the import, and very little in the form and arrangement, made to serve the same purposes under the posterior system.

Original

Original Charter.

WE have traced the history of the charters of the Romans, the Franks, Germans, and Anglo-Saxons; and we are now to view the changes they underwent after the introduction of the feudal law into this island. In other words, we are to enter upon the established system of our own Feudal Securities. We are convinced, that, in our future progress, we shall be sensible of the advantages resulting from the journey we have taken through the ages of antiquity, especially as we have hitherto proceeded under the guides of certain history, real deeds, and authentic forms, by which we have, in a considerable degree, obtained the knowledge of the true sources from whence the art of conveyancing, and the whole system of European securities, have taken their rise.

As our whole attention is henceforth to be turned to feudal principles, we shall not at present enter into any general explanation, either of the feudal law, or of the particular modifications of it, which took place in this island. A general account of that kind would be unnecessary; because it would frequently lead us into tedious repetitions. Henceforth, therefore, we are to keep close to style; taking it up in the best progress we are able, and referring to the proper feudal law, to the common law of England, and of Scotland, to history, to manners, and to every thing requisite to render the terms, the tenor, and composition, of our Scottish securities perfectly understood.

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Instead of that ancient liberty and freedom which we have formerly contemplated in the possession of land, every circumstance relating to it changed, with the law, into a system of dependence and restraint. After the example of the great Lords in France and Germany, taking advantage of the weakness of their several Princes, and the distractions attending disputed successions, an universal spirit of aristocracy seemed to spread itself over Europe. The great men who formerly commanded provinces under their Sovereign, converted their offices into property; and, in order to preserve it, refused all other dependence on the crown, but what was necessary for the preservation of the kingdom, and consequently of their own possessions. Neither their lives nor their lands were thenceforth to depend upon the supreme power; and their subjection to it was to be marked by nothing more than a few vain ceremonies. Upon every difference, they thought themselves entitled to take arms in their own defence. In short, each of them became Sovereign within his own territory. This did not happen from a principle of liberty, but from a fierce, novel, aristocratical spirit. Instead of half a dozen of tyrants in the regions of Europe, thousands of them arose in every particular country. They combated and destroyed the power of their Sovereign over themselves; but they multiplied and rivetted every species of oppression upon those under them. From this universal anarchy arose the horrible custom of making war upon each other; and of desolating the country for their private quarrels. Each Lord arrogated the whole powers of justice upon the inhabitants of his own territory; and delegated the execution of them in such manner as he pleased. His power depended upon the number of his vassals and dependents. His pride, and his manners, were imitated by those under him. Homage and military services were principally in request; and the importance of every individual was regulated by the number of dependents. The scale ended in the simple cultivators of the ground, whose persons were free; and, last of all, in the serfs or villains, whose persons were the properties of their superiors of all ranks.

‘It

“It is (says M. Voltaire) from these barbarous times the custom is derived to us, of doing homage for a house or a village, to the proprietor of another house or village. A merchant trader, who happens to make purchase of an ancient fief, receives still the faith and homage of another burghers, or of a peer of the realme who happens to be proprietor of an arrier fief in his superiority.—The law of the fiefs (continues M. Voltaire) subsists no more: But these ancient customs of dependance, of holding and of homage, are still in being. The maxim, *no superior, no land*, that is, that every inch of land must have a superior, is admitted as a rule in most of our tribunals, as if it was not sufficient for ourselves and our properties to belong to our country *.”

What M. Voltaire here says of France, is almost verbatim applicable to us in Scotland. The ceremony, indeed, of homage is not now performed, but the language of it is fully preserved. It is therefore the principles of this system, barbarous as they are, which we must now have under our consideration.

For the execution of civil justice upon his vassal, every feudal lord destined an apartment in his seat or castle, or sometimes a particular remarkable spot of his lands. The members of this court were his own tenants or vassals, who were bound to regular attendance, and sworn to do justice to each other and to their lord; and, being of equal degree among themselves, were therefore by the feudalists termed *pares curiae*. It behoved every thing that was done respecting the admission of new vassals, or a change in the tenor of the former ones, to be done before the *pares*, by which means it came to be perfectly known to all concerned. In this court the superior presided either in person or by his deputy, who received different names in different countries of Europe. A chief part of the business of the *pares curiae* is said to have been, to witness the vassal's declarations of fidelity, and the conditions of his tenure. On the other hand, to witness the grant given to the vassal, and inform the

the superior if the lands then proposed to be given, or any part of them, had or had not been formerly granted, in whole or in part, to any of themselves. If no objection lay to the grant, or to the person of the proposed vassal, the oath of fealty or fidelity was administered to him, and seifine, or possession of the property, immediately given, which was often delivered by the lord in person. ' At first, (says Craig), there was no other investiture but ' what is termed *proper*. The lord came in person to the spot of ' the feu, and there upon the ground, and in presence of the *pares* ' *curiae*, invested the vassal, by giving him the same possession which ' he himself held. So that, if the lord possessed not in person, but ' by levying of the fruits, he gave over this possession to the vassal ; ' after which the husbandman delivered him the full or natural pos- ' session of the property. Such, with us, is that investiture at this ' day, which we term *propriis manibus*, when the lord invests the ' vassal with his own hands, unless that formerly a greater degree ' of solemnity was adhibited, viz. the presence of the *pares curiae*, ' which bestowed a great degree of authority upon the investiture. ' Afterwards, the lord, at the request of the vassal, delivered him a ' *breve testatum*, which attested the fact of the delivery of the inve- ' stiture *.'

It is here to be remarked, that the feudal seifine differed in nothing from the mode of transmission of land in use among the Romans, and among the northern nations at their original settlements. The essence of it consisted in the actual delivery of the land by the former proprietor to the new acquirer ; the evidence of which consisted in the performance of a ceremony to mark the will of the seller or the granter, and the execution of that will by another ceremony of the delivery of the possession. The difference was, that, in place of a voluntary donor or seller, and a free donee or purchaser, the parties were converted into superior and vassal. The superior was to retain an interest in the land, because the price he required

was

* Craig, p. 185. f 13.

person, and then the consequent charter became the evidence of the ceremony; but, when absent, his grant or charter was made in an epistolary form, declaring his intention, and desiring the possession to be given in his name. Possession was accordingly delivered; and the written declaration made upon the fact was termed the *traditio de terra*. The feudal doctors on the continent puzzled themselves and all the world with the most subtle definitions and distinctions about the parts and the essence of the feudal investiture. Sir Thomas Craig has filled his book with opinions of that kind, drawn not from the facts of antiquity, but from a casuistical spirit, which, for a time, infected every science. The progress is exceedingly plain, suited to the understanding and practice of the times. If the superior was present to receive the homage of his new vassal, and to give him possession in presence of his neighbours, this constituted the investiture, independent of any writing. If writing did intervene by the granting of a *breve testatum* or charter, it served only as evidence of the investiture or seisin. The characteristic of the proper investiture is, that the seisin preceded the charter; whereas, in the case of an improper investiture, the charter was first given by the superior, together with a written warrant for investing the vassal, according to the tenor of the preceding charter, ‘*Secundum tenorem chartae confectae.*’ Here the charter preceded the seisin, as it does at this moment; but we shall find in practice, that most frequently the precept for seisin was granted before the charter, ‘*Secundum tenorem chartae conficiendae.*’

The Normans brought the feudal customs to England; *i. e.* they brought their own feudal customs, which agreed in general principles, and no farther. Though the books of the feudal law, and the commentators upon them, say so much of the *breve testatum*, they have preserved no original, or form, which answers with precision either to the description or definition of it given by themselves. From the ancient English writs at and after the time of the conquest, as preserved by Mr Maddox, it appears that the lords were in
use

use to grant certificates in the form of charters or *notitia* of the investitures given in their courts. These deeds come nearest to the *brevia testata* of the feudalists, being generally relations of what had passed respecting the investiture or transmission before the *pares curiae*. The only use of these are, like the *brevia testata*, evidences of the fact. Sometimes they were granted by homagers, or the *pares* themselves, and sometimes by clergymen; in which last case, Mr Maddox has, with great propriety, termed them *certificates*. This clearly proves, that the ceremony of the investiture and actual possession formed the essence of the transmission; and, if these were capable of being proved by witnesses, or in any other satisfactory manner, writing was not then, nor for ages afterwards, essentially necessary.

It was impossible that the simple feudal grant, so much boasted of by the writers upon that subject, could long subsist. In England, not many vestiges of it appear. It behoved the Norman manners to mix with those of the country; and, in place of being purely feudal, it appears that the grants of land, even at or near the conquest, contained a variety of conditions, destinations, and particular agreements, irreconcilable with the notions given us by the feudalists. In short, they appear to have been immediately accommodated to the circumstances and conventions of parties, as at this moment. Particulars of this kind were only to be preserved in writing; and therefore, the charter came often, in practice, to be written in the first place, and the seisine to follow *. 'From the time of the conquest (says Mr Maddox), when lands were passed in fee, it was usually done by infefting, and delivery of seisine; and the charter,

Q 2

' declaring

* The following is an instance of a Norman *breve testatum*, and of a precept of seisine, granted by the superior at once. It is a charter by William the Conqueror to the abbeys of Westminster, of the teinds of Rutland

' Williclmus, Rex Anglorum, Hugoni de Portu, et omnibus fidelibus suis Francigenis et Anglicis salutem, Sciatis me dedisse Sancto Petro de Westmonasterio decimam de Rotelando, et tu Hugo de Portu inde eum saisias.—Maddox, p. 290.

‘ declaring or testifying the infeftment, was called *carta feofamenti*. Now, *enfeof* seems to be no other than to grant a fief or fee *.’

The word is originally French, *enseffé*, from which we have taken our Scottish term infeftment. The charter was either granted before the actual seifine, which they call *livery of seifine*, in which case a separate precept was granted for that purpose; or it was granted posterior to the livery, in evidence of the terms of it, in which case the livery was given by the superior himself; or, thirdly, the charter contained a warrant, or power of attorney, to a bailiff, or other person for that purpose †.

Notwithstanding the restrictions of the Books of the Feus, many deeds appear to be granted after the conquest to heirs and assignees; and vassals conveyed their property to others; which they did either by appearing in the Lord’s court, and giving infeftment of their property in presence of the *pares curiae* of the Lord, or by granting a charter.

* Preface, pag. 3.

† The following is a fine example of a precept of seifine following upon, and separate from, a charter. It is granted by Henry III. for enfeoffing his eldest son, Edward, in the Isle of Oleron. It is entituled, ‘ *Mandatum Ricardo de Grey, quod seifinam insularum daret Edwardo primogenito Regis.*’

‘ *Henricus, Dei gratia, Rex Angliae, Dominus Hiberniae, Dux Normanniae et Aquitaniae, et Comes Andegaviae, dilecto et fideli suo Ricardo de Grey, salutem.—Sciatis quod dedimus et concessimus per cartam nostram, Edwardo filio nostro primogenito, insulas quas vobis commissimus custodiendas cum omnibus pertinentiis. Tenendas et habendas sibi et haeredibus suis in perpetuum. Et ideo vobis mandamus, quod omni dilatione et occasione remotis, dicto Edwardo vel certo ejus attornato, has literas deferenti, plenam seifinam predictarum insularum cum omnibus pertinentiis suis habere faciatis. In cujus rei testimonium, has literas nostras fieri fecimus patentes. Teste meipso apud Vassatum, decimo quarto die Februarii, anno regni nostri tricesimo octavo.*’

When the charter was granted posterior to the livery, and intended as evidence of it, the words were, ‘ *Sciant praesentes et futuri, quod ego Johannes de Sadburgh feofavi, et plenam seifinam liberavi Roberto de Coverham capellano, de omnibus terris et tenementis,*’ &c.

all the posterior styles both of England and Scotland. The first part is what Spelman calls the direction or address. Being grants from the Prince, they are directed to all the Peers or great men of the kingdom, both ecclesiastical and civil, who were members of the King's court. The charters of the nobility were in the same manner directed to the members of their own courts. Both Kings make use of simple titles, taken, not from the name of their kingdoms, but from their people: 'Willielmus Dei gratia Rex Anglorum.' 'Willielmus Dei gratia Rex Scotorum.'

The consideration, or what we call the cause of granting, is often specified in these ancient deeds. 'The words of the grant or donation (Spelman most justly observes) are, in royal grants, almost always the same, and in the praeterperfect tense; *dedisse, concessisse, et hac praesenti, carta confirmasse*; whereof the two first words, *dedisse et concessisse*, do imply some precedent conveyance, as, namely, a feofment or livery of seisin to have been made of the land; and that now the matter being put in writing, the donor, by that writing, doth further ratify and confirm the former alienation and livery. For (continues this instructive writer) deeds, in times past, were but notes, and subsequent remembrances of the livery precedent *.' This idea is the key to the understanding of the nature of conveyancies; for, according to modern notions, we always consider the granting, or the execution of a deed, to be the substance of

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Charter by William the Lion.

'Willielmus, Dei gratia, Rex Scotorum, Episcopis, Abbatibus, Comitibus, Baronibus, Justiciariis, Vicecomitibus, et Ministris, et omnibus probis hominibus totius terrae suae Clericis et Laicis, salutem. Sciant praesentes et futuri me dedisse, concessisse, et hac carta mea confirmasse, Waltero de Berkelay Camerario meo, Inverkiledar, per rectas divisas suas Tenend. sibi et haeredibus suis, de me et haeredibus meis, in feudo et haereditate, in bosco et plano, in terris et aquis, in pratis et pascuis, in molendinis et stagnis, in moris et stalangis, in viis et semitis, et omnibus aliis justis pertinentiis suis, cum sacka et socka, cum tel et theme, et infangenethief, cum furca et fossa, libere et quiete, plenarie et honorifice per servitium unius militis Testibus, &c.

* Reliquiae, pag. 244.

a transmissiō. But if this notion be carried back to former times, it renders the whole system of our forefathers unintelligible; and, of consequence, makes it impossible to account, with the colour of reason, for many parts of our remaining practice.

The next clause is the name of the lands, which Spelman calls *the thing granted*. Lands of great extent, at this time and long after, were conveyed by a simple name, to which the place was sometimes added. There was no mention of the extent of the boundaries; these were presumed to be perfectly known to the other vassals, and to the inhabitants in general; and therefore they are granted by their just boundaries, '*per rectas divisas suas*.'

The next thing is the *tenendum et habendum*, or the quality of the estate granted. The use of it (says Spelman) was, as well to express the thing granted by the particulars and appurtenances, as to limit the estate and the tenure. '*Tenendum sibi et haeredibus suis de me, et haeredibus meis in feudo et haereditate*.' This was the manner or tenure of the estate. It was to be held in dependence upon the granter, and his heirs, in fee and heritage; *i. e.* it was to be held as a fee in perpetuity. Then come the appurtenances or pertinents. '*In bosco et plano, &c.; in terris et aquis, &c.*' The custom being to express the lands by a single name, or term, the conveyancers thought it necessary to amplify it by enumeration of all the advantages. This clause was used among the Romans with the utmost prolixity: It was continued, but considerably shortened, by the Franks and other nations; and handed down with such variations as belonged to the particular surface or face of each country.

To this enumeration was added that of the jurisdiction and privileges conveyed with the lands, every word of which needs explanation. '*Cum sacca et socka; cum tol et theme et infangthief; cum furca et fossa libere quiete*,' &c. '*Sock* (says Skene) is ane auld word used in charters and infeoffments, quhilk in syndry auld buiks, containing the municipal lawes of this realme, is called *secta de hominibus suis in curia secundum consuetudinem regni*. So, after my
'opinion,

‘ opinion, he who is infeft with fock has power or liberty to hauld
 ‘ courts within his awen barony or lands; in the quhilk courts *bo-*
 ‘ *mines fui*, or his vaffals, fhould give fuit, or fend in their place ane
 ‘ wha is called *fuitor* or *fatator a fequendo*; becaufe he fhould follow
 ‘ the court in the quhilk he fhould appear *.’ It was formerly ob-
 ferved upon Skene’s works, that it was a ftrange piece of conduct
 not to publifh thofe *auld buiks* which contained the municipal laws
 of the realm, efpecially as he fays they were going to ruin. He
 feems to have kept them up, in order to be retailed upon occasions,
 and to give value to his own works. Dr Cowel, the author of the
 Englifh Law Interpreter, agrees with Skene. He fays, that *sock* is
 the fuit of a court due by the inhabitants of a lordfhip or manor;
 and *fack* is the liberty of holding pleas, and impofing mulcts and for-
 feitures upon transgreffions in that court. So that *socka et facka*
 came to be expreffed by the common words, *cum curiis et earum exi-*
tibus. Thefe expositions (the Doctör fays) he gives out of a very
 ancient MS. in which are regiftered feveral donations to a cathedral
 church in England. This ancient MS. book we have difcovered to
 be the very fame with the Auld Buiks of Skene, which he fays con-
 tained the municipal laws of Scotland. It is a glossary, or expofi-
 tion, of the ancient technical terms of charters, and has been engrof-
 fed verbatim into almoft every one of our MS. copies of the Regiam
 Majestatem; which, if any thing can be, is a complete proof that
 the law treatifes of each country were perfectly common to both;
 for this curious tract is written neither by an Englifhman nor a
 Scotsman, but by a Norman, who profefles himfelf to be expert both
 in the French, Englifh, and Latin languages.

The next words are *toll* and *theme*. ‘ *Toll* (fays Skene) is cus-
 ‘ tom, from a Greek word of the fame fignification.’—‘ He quha is
 ‘ infeft with *toll*, is custom free, and payis na custome, quhilk is ma-
 ‘ nifest be findry auld buikes quhair it is written’—‘ Quod vos et
 ‘ homines veftri de toto homagio veftro funt quieti de omnibus mer-
 ‘ catis

* Sig. Verb. voce Sock.

took place in Scotland, as appears by all our charters previous to the reign of James I. ; but there is no evidence of any survey or division for that purpose, as in England. The probability is, that, in imitation of the Anglo-Normans, our Kings and nobility only introduced this tenure by their particular grants, which, after our wars with England, grew into disuse, and sunk into the ward holding, or common military tenure.

In England, when the granter of a charter of feofment was present upon the spot, he made the livery in person ; and the evidence of it was no other than a memorandum, written upon the back of the deed of infeofment ; sometimes sealed by him, at other times by the witnesses present, and often without any seal. The livery of seifine was an introduction to the real possession of the land, which proved itself. When the granter was absent, the practice at first was to give a separate power of attorney, appointing others to deliver the possession in his name. If he himself had not the possession, or, as we would say, was not infeft, he empowered his attorneys first to take the real possession, and then to deliver it to the grantee. These powers of attorney came very soon to be annexed to the grants or deeds of feofment themselves, in the same manner as precepts of seifine are with us. That both were at one period the same, is proved by several deeds in that valuable collection published by Mr Maddox, from which we shall only take one as an instance *. The attorneys,

* Et insuper noveritis nos praefatum Willielmum Smyth, &c. fecisse, ordinasse ; constituiisse, et in loco nostro posuisse, delectos nobis in Christo Willielmum Heyden, &c. *Gentilmen*, conjunctim et divisim, nostros veros et legitimos attornatos, ad intrandum in manerio predicto, cum pertinentiis, ac in predictis messuagiis, terris, tenementis, et caeteris premissis, et in omnibus suis pertinentiis, et seisinam inde pro nobis et nominibus nostris capiendum, et post hujusmodi ingressum et seisinam, sic inde captam et habitam, ad plenariam seisinam inde prefatis Ricardo Dunelminsi, &c. Habendum eis et haeredibus suis *juris viam*, formam, et effectum hujus presentis cartae nostrae deliberandum ; ratum et gratum habentes, et habituri, totum et quicquid dicti attornati nostri seu aliquis eorum in premissis fecerit. In cujus Rei testimonium huic presenti cartae sigilla nostra apposuimus, datae vicesimo die mensis Junii, anno regni regis Henrici Septimi, post conquestum quarto decimo.

lish memorandum, or indorsement of the livery. In fact, it is a certificate of the livery, in the precise form of the English certificates, in Mr Maddox's Collection; for, what we call *an execution* of any thing, they call *an indorsement*, being written upon the back of the deed executed; but, when separated, it is called *a certificate*. Such is the writing we are now considering. This certificate is not directed to the *pares curiae*, or vassals of Earl Douglas, according to Sir Thomas Craig's notion of the ancient investiture; but it is directed to all and sundry; exactly in the style of the same deeds in England. The high sounding titles of the Earl of Douglas indicates the spirit of the Scottish aristocracy. Vassals vied with each other in the slavish custom of lavishing titles upon their patrons; and the nobility and the haughty nobles refused nothing that flattery could devise. Our's of Scotland did no more than they saw done by their neighbours; for the great men on the continent left nothing to royalty. It is to be remarked, that what we call *the precept of seisin*, is in this deed, with great propriety, termed *a letter of bailiery and of seisin*, which all our precepts are. They first constitute a bailie in that part, and next empower him to act. This shows, that precepts of seisin had, at an early period, ceased to be directed to the actual officer of the superior, but to a bailie in that part; and that the witnesses before whom the letter was read, were not *pares curiae*, but merely called as witnesses. The charter of the lands in question had already been granted; it is *secundum tenorem cartarum confectarum*,

The

‘ am de predictis terris de Tulyalon, cum pertinentiis, et de forseto ejusdem, cum se-
 ‘ cundum formam et tenorem Cartarum dicti Domini Comitis de Douglas, inde sibi
 ‘ confectarum adhiberem; et incontinenti ego dictus Willielmus de Preston, ad in-
 ‘ stantiam dicti Domini Johannis de Edmonston, virtute dicti officii ballivi michi in hac
 ‘ parte ordinati, ipsum predictum Dominum Johannem de Edmonston, in predictas
 ‘ terras de Tulyalon, cum pertinentiis, secundum formam et tenorem dictarum Carta-
 ‘ rum, hereditarie assignavi et investiavi, et in corporalem possessionem introduxi, huius-
 ‘ testibus, &c.

The mode of giving seifine, mentioned in this deed, is remarkable, and full of instruction. In the first place, it will be observed, that no symbols are mentioned; because the possession was not civil or symbolical, it was real: And though, from all antiquity, symbols upon these occasions had been used, the mention of them was of no consequence; and hence it is, that, in the English indorsement or memorandum of the livery, symbols are seldom or never taken notice of. By seifine, real possession, and no other, is understood. The bailie says, he gave seifine of the lands of Tulyalon, with the pertinents, and of the fortalice of the same, with the pertinents. These were separate acts. The words *seised* and *invested*, applied to the lands; and the words *introduced into corporal possession*, applied to the fortalice. The mark or symbol of the lands was earth and stone, or something of that nature; but that of the house or fortalice (which all gentlemen's houses of any consequence then were) was different. From the days of Marculfus, in the 7th century, to the *Leges Burgorum*, or borough laws, in the days of our Malcolm, the seifine of houses was real. The party seller, or somebody in his name, went out, and the purchaser entered in, and shut the door. This is the dictate of our borough laws; and, upon every country estate where there was a family mansion, separate seifines were constantly taken. In Rymer's *Foedera*, there appears an instrument of seifine in favour of the Queen of James IV. daughter of Henry VII. of the Castles of Edinburgh, Dumbarton, and Stirling. The Scottish garrisons marched out, and a party of English, in the Queen's name, entered the Castles, and dropped the port-cullices and draw-bridges, upon which a solemn instrument of seifine is taken *.

This.

* The latest instance of this we have seen, is in a seifine of the lands of Kinkerryn, in Fifeshire. The ceremony is thus expressed: ' Statum seifinam, et hereditariam possessionem, totalium et integrarum terrarum de Kolkarni, cum pertinentiis, prefato Willielmo Moubray, per terrae et lapidis traditionem, dedit, contulit, pariter et de liberavit secundum tenorem cartae sibi desuper confectae, ipsiusque Willielmi Moubray, in capitali messuagio ejusdem terrarum de Kolkarni, cunctis aliis inde con-

This real mode of seifine was only dropped at the beginning of the last century ; and it gives us the reason why single houses have no symbol but earth and stone. The notaries had nothing else to substitute in place of real and corporeal possession, which had been given all over Europe for more than a thousand years before. There are several witnesses to this declaration, but they plainly are not *pares curiae* ; and the certificate is tested by the seal of the bailie, and by the seal of Sir John Stewart of Innermeth, who is the principal witness, and whom the bailie says he has prevailed with to append his seal, for the sake of better evidence.

When the superior gave the seifine *propriis manibus*, he gave a certificate or declaration of the fact, in a style similar to that of the Baillie. Sir James Balfour has preserved this curious style, which is entitled, ' A Testimonial of a Seifine given by the Overlord *propriis manibus* *.' This certificate we must acknowledge to be much superior, in point of security and evidence, to any form now remaining ; but it was only to be had when the superior could write. If he

* *pulsis, in signum realis corporalis et actualis possessionis ejusmodi terrarum de Kol-*
carni cum pertinen. fasinatum et vestitum in perpetuum secundum tenorem cartae
sibi desuper confectae ut predicatur salvo jure cujuslibet.

* ' To all and syndry to quhais knowlege thir present letters fall cum, I A. B. superior of the lands underwritten, greeting in God everlasting, Wit ze that ane needful thing it is to bear leal witness to the soothfastness, and speciallic in the cause or causes quhairthto the hiding of the verity may gender prejudice or skaith to the innocentis :—Herefoir it is, that I A. B. beairand witnessing lillie and trulie, makes it to your universities, that the day and date of thir presents, I past personallie to my lands of C. lyand within the barony of D. and scherisdome of E. and thair, upon the grounds of the saids lands, I gave and delivered heritabel state, saine, and possession corporal, of all and haill my saids lands, with their pertinents, to an honorabil person T. G. as use is in sick things to be done, efter the forme and tenour of the chartour made or to be made by me to him thereupon. The quhilk, to all and fundrie quhom it effeirs, I mak known and beiris lillie witnessing thereof be thir presents. In witness of the quhilk thing, to this my testimonial, subscrivit with my hand as follows, I have hung my seill, at E. die, &c. mensis, &c. anno Domini, &c. before these witnesses, &c. 13 July 1498.'—*Balfour, pag. 176.*

were called to attest the delivery of seifine. This saved declarations of every kind, both by Bailies and superiors; and accordingly, instruments of seifine were in use, among the rest, long prior to the return of James I. from England. These instruments are daily making their appearance, upon the examination of family charter chests. Mr Erskine has published one, No. 4. of his Appendix, dated twenty years before the return of James I. It is given upon a precept of *clare constat* by William of Abernethy, laird of Salton, and differs in little or nothing from the instruments we now use. A procurator appears in the name of the heir to be infeft: He produces his letter of attorney from the Chancery, under the testimony of the great seal. No man was allowed, in these days, to constitute a procurator upon any other authority; because disputes respecting land being, by the common law, determinable only by single combat of the parties, it was customary for those, who, from sickness, inability, or other circumstances, could not fight, to obtain licence to have a champion or attorney. The King only could give such a licence; and though, in process of time, fighting with the sword was changed into an encounter with the tongue, yet still the custom of obtaining licence from the Chancery remained.

In England, the same usage took place. Writers inform us, that, anciently, the judges in the courts were not obliged to admit the appearance of any man in behalf of the defendants; and, therefore, where such defendants could not appear in person, it behoved them to obtain, from Chancery, a writ constituting others attorneys in their behalf. In the matter of seifine in England, it was necessary that there should be an attorney for the purchaser or acquirer to receive it, and another for the lord superior, or the donor, to deliver it. The instrument we are talking of, proves that the same form existed in Scotland. The possession of the precept was not then, as it is now, sufficient to authorise an attorney. It was not enough for the notary to say, that this power was well or sufficiently known to him: It behoved the attorney to produce a writ, under the testimony

tom always to take investiture at the principal messuage, because the possession of the house was part of the ceremony of the possession of the ground; and that is the reason that, to this day, seisin continues to be taken at the manor place of baronies, and other estates, although the ceremony of giving seisin of the house itself has been dropped for near two hundred years. This instrument bears, that possession and hereditary seisin was given with 'earth and stone, as use is.' This is the first instrument in which we have met with the symbols expressed. The ancient symbols were earth and grass, properly denoting the land, and the fruits of the land. How we came to change them for the senseless symbols of earth and stone we cannot say, for both these are the substances of the land.

The instrument next bears, that the bailie took for seisin a black ox, spotted with white. A seisin ox was the ancient fee of the King's sheriff; and the bailies of the nobility made the same claim upon the vassals. Craig mentions this in several places; but what he says is taken from an old decision preserved by Balfour. 'Safine beand gevin be ane over-lord to his tenant, of ony landes by him self, with his awin handis, or be his procuratour, the tenant aucht and sould deliver to his over-lord ane safine ox; and gif he refuses or postpones to do the samin, his gudes and gear may be poindit and distrenziet therefor, be the superior, without ony sentence or declaratour given thereanent be ony other judge *.'

This instrument is taken by an imperial notary; and the long docquet, *et ego vero*, is the very same, verbatim, used in our present seisines. In those cases where the precept went before the charter, it behoved to be a separate deed; but, when meant to follow the charter, it was a very plain improvement to annex it in the same deed. The English did this at a very early period. They annexed the letters for giving the livery to the charter of feoffment itself. In Scotland, we kept our precepts separate, till about the middle of the sixteenth century. 'The investiture (says Craig) is taken jointly

* July 15. 1533.

or an annuity constituted; all was done by a deed containing the fixed order of clauses: So that, however our deeds and forms seem to be different from one another, it was not so of old; and it is more so at this moment in appearance than in reality, as we shall afterwards be sufficiently convinced.

We shall, in the first place, analyse an English charter, or charter of feofment, the style of which we take from Judge Blackstone. ‘*Sciant presentes et futuri, quod ego Willielmus, filius Willielmi de Sehing, &c. dedi, concessi, et hac presenti carta mea confirmavi, Johanni quondam filio Johannis de Saleford, pro quadam summa pecunie quam mihi dedit pre manibus, unam acram terrae meae arabilis, jacentem in campo de Saleford; juxta terram quondam Ricardi de la Mare.*’—The general title of this clause (as Lord Coke observes) is *the premises*, which includes several distinct parts. First, the address or direction, ‘*Sciant presentes et futuri.*’ Next the name and designation of the party, which the English call *their addition*, or *their title*. Then the words, or certainty of the grant, ‘*dedi concessi et hac presente carta mea confirmavi.*’ Next comes the name and title of the grantee. Then the consideration upon which the deed is made, which is here ‘*pro quadam summa pecunie quam mihi dedit pre manibus.*’ Lastly, the certainty of the thing granted, or the description of the lands, which the English lawyers term *the parcels*. All these are included under the general title of *the premises*: So that what is included in all English deeds, from the beginning to the *habendum*, goes constantly under that denomination. If any fact is to be explained, or any previous deeds recited, the place of all such recitals is the premises. The word itself is evidently from *premittere*, to put or send before; and though we have lost the use of the term as the name of a fixed clause, yet do we use it every moment in the same sense. For when, in our deeds, we talk about the premises, we mean the things before set forth in what we term the *dispositive clause*, which is the essence of our deeds. The premises declare the will and intention of the granter. All the

the other parts of the deed are regulated by this one ; they will give right to nothing not implied or contained in the dispositive words ; and if any part of the matter thereby disposed be omitted in the other clauses, the law holds it as an omission, and supplies it accordingly. There is no word more frequent in our own writs than that of *premises*. We use it without a precise idea, and yet without impropriety. In general, it imports the subject matter of the deed : ‘ All and sundry the premises ; ’ ‘ all right and title in the premises ; ’ &c. ; *i. e.* in the lands or other property before disposed. The word *premises*, then, as it denotes the most material part of the deed, retains its importance wherever it is used.

The next clause has the fixed title of the *habendum* : ‘ Habendum et tenendam totam predictam acram terrae, cum omnibus ejus pertinentiis, prefato Johanni et haeredibus suis et suis assignatis de capitalibus Dominis feodi. ’—The *habendum* (says Lord Coke) has two parts ; it names again the feoffee, and it limits the certainty of the estate. By the *certainty* of an estate, the English writers mean what we generally term the *destination* of it ; but their’s is by much the better word. Here it is expressed whether the estate is given for time or for life, whether in fee-simple or tail, *i. e.* to heirs of entail. ‘ Sometimes (says Judge Blackstone) this limitation is made in the premises, and repeated in the *habendum* ; but, if they differ, the words of the premises must rule the *habendum*. ’ So the words of our dispositive clause regulates the whole deed. Thus, though a person, or a property upon which the premises are silent, be named or specified in the *habendum*, that person will have no interest in, nor will that property be carried by such specification. Because the office of the *habendum* is not to give, but to limit the thing given. Therefore, as Blackstone observes, had an estate been given to a man and his heirs in the premises, and only for life, by the *habendum*, the latter would be utterly void ; for an estate or inheritance is vested in him by the premises, and cannot be afterwards taken away. The *tenendum*, or mode of holding, is here ‘ De capitalibus talibus

‘talibus Dominis feodi.’ This is the principal difference between the original charter of Scotland and of England. Formerly the *tenendas*, or modes of tenure, were as various in England as in Scotland. But, upon a complaint made by the great vassals of the English Crown, that they lost their rents and services by their vassals giving out the lands to be held of themselves, or, according to our language, *by sub-feuing them without end*; a statute passed in the 18th year of the reign of Edward I. intituled, from the first words, ‘*Quia emptores terrarum*;

whereby all vassals were discharged from granting or conveying their lands in any other form than to be held of the superiors, or chief lords of the fee themselves, and not of the vassal, granter of the deed. Before that statute, it was usual to name the superior of which it was to be held; but, after the statute, it was ever ‘*Tenendum de capitalibus Dominis feodi*.’ The species of the tenure used also to be expressed, viz. ‘*Tenendum per servitium militare*;

or ‘*per servitium unius militis*,’ &c. That is now quite unnecessary, because all the ancient tenures were in Charles II.’s time reduced to free and common soccage, *i. e.* they were reduced, as the ward holdings were with us in the year 1748, into small money payments. The *tenendas*, therefore, in the English charters became mere style, a remnant of antiquity, kept in only by custom. The next is the *reddendo*.

‘*Reddendo et faciendo annuatim eisdem Dominis capitalibus servitia inde debita et consueta*.’—The *reddendum* is termed the *reservation*; and, in this clause, all the terms and stipulations of the grant use to be included. The *servitia debita et consueta*, are the original services due to the lord of the fee. The granter of the deed, if he pleases, in this place may, and usually does make another reservation or *reddendum* to himself, which the English call a reserved *rent* or *service*. We, in Scotland, effect this either by a sub-feu or reservation, at our pleasure.

‘*Et ego predictus Willielmus et haeredes mei et mei assignati, totam predictam acram terrae, cum omnibus suis pertinentiis, predicto*

“dicto Johanni de-Saleford et heredibus suis et suis assignatis, contra omnes gentes warrantizabimus in perpetuum.”—In the very ancient charters from Marculfus, it will be remembered what methods were taken to insure the lands to the donee or purchaser. Amongst other ideas brought in by the rude nations, the ancient and natural notion of property made a considerable figure. The father was not considered as the sole and free holder of the family estate: His children, or his heirs, were considered to have an interest, a joint right in the property, of which they could not be deprived by any voluntary deed of the father; consequently, it was often customary with the heirs to enter upon, and possess themselves of the lands which belonged to their predecessors, without respect to any dispositions he had made of them during life. For this reason, the first method taken was to subject the heir to fines or penalties, to interest the King in levying them, by giving a part to the fisc, or public treasury; and to interest the church, by giving the other half to the building of convents, to the support of the Croisades, to the reparation of churches, and other holy purposes. To this the spiritual pains of excommunication were afterwards added. Next to these succeeded the clause of warrantice. When a moveable, in the possession of any other person, was challenged by another as his property, the holder was obliged to condescend upon the manner in which he acquired it, and upon the person who gave or sold it to him. This person the law allowed to be called in court, who was obliged to defend, warrant, or maintain the person who called upon him in the possession. The presumption was, that the purchaser had given a valuable consideration for the property he held. In the same manner, the possessor of lands was allowed, upon a challenge from a third party, to call upon the person from whom he purchased or acquired, to defend him from the challenge made. This coincides with the principles of the civil law, by which the seller is always bound to make good the subject of sale to the purchaser. The person (or, as we say, the author) called upon to defend, was of old,
and

and is still in England, called the *voucher*, from the Latin term *vocare, to call*: So that the voucher means the person called upon. This word is, in our practice, changed to *author*; for so the seller or disponent is with us constantly named. We have also retained the word *voucher*; but, in place of being applied to persons, we now confine it to the titles, papers, or written instructions of accounts, claims, or debts of every kind. The ancient law, however, obliged people to warrant where a valuable consideration was presumed to be given. Homage and service of the party, with the feudal consequences, were considered to be a valuable consideration; and therefore the lord, in these cases, was by the law bound to warranty. In the case of exchange of land, each party, and their heirs, were held to be bound; because the injustice would have been evident, had one of them been deprived of the subject of his exchange, and the other to continue to possess what he had got. 'Therefore, (says our Regiam Majestatem), gif ane man gives lands to ane other for his homage and service, the quhilk land ane thrid person evicts and recovers in judgement, the giver thereof sall be oblissed for warrandice of the samin, or for ane competent excambion or exchange, equivalent to the lands evicted *.'

These warrandices were implied, or held to exist, from the nature of the grant, though not expressed; and this is the reason that, in many ancient feudal charters, no clause or mention of warranty is to be found. In order to avoid the disputes about implied warrandice, and in particular, to bind the heir to make good the deeds of his predecessor, express clauses of warrandice were devised and inserted in charters. 'These express warranties (says Blackstone) were introduced even prior to the statute of *Quia Emptores*, in order to evade the strictness of the feudal doctrine of non-alienation, without the consent of the heir: For though he, at the death of his ancestor, might have entered upon any tenements that were aliened without his concurrence; yet if a clause of warranty was added

* Book 2. c. 67.

England, or ward holding in Scotland ; because military service, by the feudal law, was the radical and universal tenure of all the lands where that law prevailed. Other modes of tenure were, by the feudalists, held to be deviations from the first principle, depending upon the covenants of parties, which could no where appear but from the terms of the deed. Ever since Sir Thomas Craig's publication of the book *de Feudis*, all our lawyers without exception, setting aside the actual practice and the particular customs of their own country, have followed Sir Thomas, in neglecting what had happened in our own nation for ages, and in adjusting our whole system of securities to the principles of the written books of the feus, and the commentators upon them. These are what Sir Thomas calls the *pure sources of the law* ; and, consequently, every thing not conform to them are considered as pollutions of the stream. We therefore must follow the very same tract. In the progress, however, we shall be careful to difference those parts which really and truly belong to our ancient customs and common law, from those which have been introduced by our modern lawyers. For we contend, that, however they may have been able to establish their theory, they have not been able to account for the best part of our styles and forms ; because our styles and forms did not, in the generality of cases, follow the innovations of the law.

Having once more made this remark, it is necessary to attend to Sir Thomas Craig's definition of a proper feu, and endeavour from that station to find our way through the variety of land rights which is supposed to have been founded upon it. ' Beneficium, ' feu benevola et libera rei immobilis aut equipollentis concessio cum ' utilis dominii translatione, retento proprietate sui dominio directo, ' sub fidelitate et exhibitione servitiorum honestorum.' Sir Thomas having given this definition, is sorry that it ever should have been departed from. He laments the weakness of these latter times : ' Post senescentibus seculis, cum in pretio tantum pretium habere- ' tur, militares operae negligi ceperunt, et martia illa feudi natura

' inquinata

amined, they certainly are so, as it is impossible to reduce them under any precise definition. The doubtful meaning of these words afforded an admirable exercise for the subtle genius of the feudal doctors. Some insisted, that the right of the vassal was a perpetual life-rent; others, that it was a servitude; while a third party gave it a different title; inasmuch that Craig tells us, 'That the Greeks and Trojans never fought more for the dead body of Achilles, than the ancient and modern doctors have contended the import of these words.' Craig admits, that Cujacius's opinion is favoured by the text of the feudal law, and comes nearer to the idea that a *dominium utile* is a life-rent, perpetuated in the person of the vassal and his heirs. But still they differ in these capital circumstances, that a life-rent keeps up little or no connection between proprietor and life-renter; whereas the *dominium utile* supports a constant intercourse between the superior and the vassal, while each renovation of the grant in favours of the vassal, or his heirs, recalls to memory the original liberality of the grantor, the dependence of the vassal, and, at the same time, holds out an act of the exercise of the *dominium directum* retained. None of these things coincide with a life-rent or a servitude. What increases the difficulty is, that the *dominium directum* of all lands remains with the Crown; with regard to which, all the feudal lords themselves possess but a *dominium utile*. By giving out lands to others, they, however, constitute a *dominium directum*; and, when these vassals again sub-feu, each of these, looking downwards to his own vassal, becomes the overlord and direct proprietor. By this means, the same land comes to have many lords and many vassals, rising in a scale from the actual and natural possessor to the King, who is sovereign of the whole. Though these things cannot be reconciled, yet they certainly do exist; and we have no other terms than the *dominium directum et utile*, one of which is to be retained as the technical term for expressing the interest which each superior retains after granting, and the other the interest which each man acquires upon receiving a feu. The English term the King
Lord

and to imagine that nothing could be given or possessed upon any other principles or forms. The nature of the free and absolute Roman grant or conveyance, was in a manner obliterated out of the memory and understanding of the inhabitants of the feudal kingdoms. Offices, privileges, and incorporeal rights, were granted in the form of feus, and by all the different kinds of tenure, just as lands themselves. No other mode of conveyance or concession could be conceived. This accounts for a singularity, which to us, at first sight, carries an appearance of absurdity. We imagined the commerce of these incorporeal rights should have been governed by rules suitable to their own nature, and not classed with land. The fact shows us, however, that we are mistaken. Craig, and the other feudalists, bring them under the title *equipollents* to land.

‘Sub fidelitate.’—This was the essential part of a feu; and, according to Craig, and the feudal writers, it was tacitly implied without being expressed. It behoved the superior to protect his vassal; and it was the duty of the other to repay that protection with fidelity. For this purpose an oath was required, which the text of the feudal law declares might be dispensed with. The commentators, however, and Sir Thomas Craig in particular, deny this. They will not suffer even the feudal law itself to be so loose. They say it is the oath, and not the fidelity, that can be dispensed with; and that bargains to that purpose would be null. A superior, therefore, could not agree to suffer the infidelity of his vassals, or engage not to forfeit or recal his feu upon that account. There were two oaths, which in the days of our forefathers, used to be required. The oath of fealty or fidelity, and the oath of homage, which oaths were taken, and still are taken in France, upon the entry of each heir. The first thing to be done, was to take the oaths of homage and fidelity to the superior. The latter oath was taken by women, by clergymen, and others who could not serve in war; and it was also taken, by agreement, among men of equal rank, who did not choose to do
homage

homage to each other, and by vassals of all kinds, whatever their tenure was.

‘Et exhibitione servitiorum honestorum.’—The grant is given for performance of honourable services, which were always personal and uncertain. If any particular services were stipulated, it was no proper feu. The true service was, ‘Ut cum armis et equis ad Domini imperium quoties mandaverit paratus sit.’

Sir Thomas Craig’s grand definition of his feu being thus explained, we are thereby sufficiently prepared for the understanding of the Scottish charter, according to his system, which is that of all our lawyers and formalists, from the publication of his celebrated treatise to our present practice.

Before entering upon the Scottish charter, however, it is necessary to say something of the language generally termed *Law Latin*. By examining the most ancient forms which existed among the Romans of Gaul about the time of the eruption of the Barbarians, we discovered that the language, even at that period, was corrupted to a degree almost incredible. The barbarians adopted the language of the conquered, with all their forms; which soon appear tainted by an increasing alloy of Teutonic terms, hostile to the genius of the Latin tongue. Latin was formerly universal, because it had been the language of the masters of the world. When Rome raised her spiritual empire, it was the language of the universal church; and, consequently, most proper to carry evidence of any thing into futurity, in fixed and unchangeable words. The Books of the Feus were written in that language; and, after the works of Justinian came to be every where studied, the most desirable accomplishment was to write elegant Latin; and, indeed, the alteration is sufficiently visible wherever the subject could possibly admit it. A number of Gothic derivatives, however, and new terms, existed, totally unknown to pure Latinity; and the pleadings, or judicial proceedings, being retained, increased that ancient jargon afterwards called *Law Latin*. ‘It is true, indeed,’ (says Judge Blackstone) that the many terms of art, in which the
‘law

' law abounds, are sufficiently harsh when Latinised; yet not more
 ' so than other sciences. It would puzzle the most classical scholar
 ' to find an appellation in his pure Latinity for a constable, a record,
 ' or a deed of feofment. It is therefore to be imputed as much to
 ' necessity as ignorance, that they were styled in our forensic dialect
 ' *constabularius*, *recordum*, and *feoffamentum*. Thus, again, another
 ' uncouth word for our ancient laws (for I defend not the ridiculous
 ' barbarisms sometimes introduced by the ignorance of modern prac-
 ' tisers) is the substantive *murdrum*, or the verb *murdrare*; and, how-
 ' ever harsh and unclassical it may seem, was necessarily framed to
 ' express a particular offence, since no other word in being, *occidere*,
 ' *interficere*, *necare*, or the like, was sufficient to express the inten-
 ' tion of the criminal, or *quo animo* the act was perpetrated; and,
 ' therefore, by no means came up to the notion of murder at pre-
 ' sent entertained in our law, viz. a killing with malice and fore-
 ' thought *.'

This well instructed writer adopts not the vulgar idea, that the
 common law Latin is the production of our ancestors in this island,
 and a monument of their particular rudeness. At the conquest of
 England, in order to rivet the Norman fetters upon the nation, the
 pleadings and records of the courts were ordered to be in the lan-
 guage of the conquerors. This lasted till the reign of Edward III.
 when, in contempt of the French, then almost subdued by the arms
 of England, their language was dismissed from public business, and
 the Latin restored.

' This technical Latin (says the same author in another place) con-
 ' tinued in use from the time of its first introduction, till the subver-
 ' sion of our antient constitution under Cromwell; when, among
 ' many other innovations in the law, (some for the better, and some
 ' for the worse), the language of our records was altered and turned
 ' into English. But at the restoration of King Charles, this novelty
 ' was no longer countenanced, the practisers finding it very difficult

to.

the same time, and by the same authority, as Judge Blackstone tells us, had been done in England. The High Court of Justice established by Cromwell, upon the reduction of this country, was pleased to banish Latin from all our forms. These judges had no regard to antiquity; they were acquainted with no language but their own; and they choosed to understand what they heard without the aid of interpreters. After the Restoration, almost every thing they did was altered; because it had been done by them without regard to the nature of the thing, whether good or bad. Accordingly, the ancient practice of writing in Latin was restored by the following act of federunt, dated 6th June 1661. ‘The Lords considering, that, during the power of the late usurpers, the use and custom of writing in Latin was then discharged; therefore ordain, that all charters, safines, and others of that nature, as well such as pass the seals as otherwise, which were in use to be formed and written in Latin, be continued in the same language as formerly before the year 1652.’ This act was for some time obeyed; and all charters from the crown, and from subjects, were written in Latin. About the end of the last century, the charter of subjects ceased to be so; and by degrees the Latin was banished from common business. The chancery, however, have uniformly kept up the old language, in obedience to the act last mentioned.

We now proceed to the pure feudal charter, as coinciding with the definition we formerly analysed from Sir Thomas Craig. What the English call *the parts* of a deed, we call *the clauses*, in imitation of the French, each part or clause being capable of separation, and including, like sentences in a discourse, some distinct part of the matter settled between the parties. The reason that the English do not use this term is, that all their securities, *de facto*, consist of the same original order of clauses as the charter; and each of these is known by the initial words, or by a particular name, such as the *premises*, the *parcels*, the *habendum*, the *tenendum*, &c. After the translation of our deeds into English, and the desertion of the fixed and ancient Latin.

it is impossible to divide it; and, even where recitals of papers come in to demonstrate the cause of granting; yet still the narrative cannot stand by itself, the sentence not being complete. It cannot, therefore, be termed a *clause*; for each clause must include a complete sense, capable of standing by itself. Upon that account it is, that, in long recitals, we are obliged to connect them with the dispositive clause by a *therefore*, or some such conjunctive word. It is, in fact, the essential part of the deed; and, since we refer to it every moment, under the title of the *premises*, it is strange how our late conveyancers should have changed it for the senseless and non-existent division of a narrative and dispositive clause, which are only parts of the premises, and by no means separate clauses.

In analysing this grand clause, we find it to consist of the following particulars: First the address, ‘Omnibus hanc cartam visuris vel perlecturis.’—One of the most ancient forms is here chosen. To all those who are to see and hear; that is, to those who can read, and those who cannot read; and so of old many deeds were directed.

The salute, ‘Salutem.’ This charter is in the form of a letter, directed to all and sundry; which is always understood, though sometimes not expressed. This, together with the *vobis notum facio*, ranks the charter among the *notitiae*, and distinguishes it from the instrument, where the parties speak in the third person, which, in general, is no more than a declaration of what had been done.

“The names of the parties, or of the granter and receiver, together with the cause, value, or consideration, for which the deed is to be granted; or the lands given.”—The names and designations cannot be too plain or specifically set down. When the granter is not a nobleman, he is generally termed *superior* of the lands and others after described; but when he is a man of rank and dignity, the lands from which he takes his titles used to be enumerated, and continue to be so, when he is disposing of a part of such lands. His superiority, therefore, is presumed to be universally known.

‘The

cannot be contradicted. For example, if lands are given to a man or his heirs whatsoever, and afterwards mentioned or declared to be only for life, or to one heir, the posterior words will be void, as inconsistent with the previous and essential destination of the deed. We need scarcely mention the reason of the repetition of the verbs in the present tense, which is retained in all our styles. The ancient deeds related to a prior investment or seisin given of the lands, which was only declared or confirmed by the charter; but afterwards, the granting or execution of the charter itself came to be considered as the principal dispositive act in the business; and therefore the donative words are repeated in the infinitives, *dare, concedere, et disponere*, which are proper to a grant given gratuitously, or, as the feudalists say, from *pure liberality*.

‘*Sine reversionis facultate.*’—These words are frequent in our styles, and have more than a literal meaning. They allude to an unhappy period of the history of both nations, when faction raged among our great men, and when one party, as soon as they got into power, ruined and forfeited another. To provide against misfortunes, it became customary all over the island to convey their estates to trustees by charters and seisin, *ex facie*, simple and irredeemable, but, at the same time, to take a separate bond of reversion, which they could conceal or convey by assignment as they pleased. This was particularly the practice anterior to the reign of James III.; and some of the earliest of our Scottish acts relating to private property were made for the regulation of these fictitious sales. Therefore it was, that conveyancers, where an actual transmission was intended by the deed, were careful to add such words as those in the dispositive clause, ‘Without any redemption, reversion, or regrefs whatsoever.’ We shall say nothing at present of the description of the lands, because that matter, together with the measurements, and technical terms relating to them, will require the best part of a discourse to itself.

‘Cum

lish charter has it, it is ‘*Tenenda de me, et haeredibus meis, per servitium, wardam, et relevium ;*’ *i. e.* by military service, ward, and relief. The ward or custody of a minor heir of a military vassal, and the necessity which the heir lay under of relieving the lands out of the superior’s hand, into which they were supposed to have fallen back by the death of the vassal, were the characteristics and principal profits of a military feu. Our conveyancers specified the ward or relief in the *tenenda*. Sir Thomas Craig would have told them that this was not upon principle: It looked like a condition; and therefore the words *per servitium militare*, would have been enough, as the law, in all cases, pointed out what belonged to that capital tenure. The next clause in order is the *reddendo*.

‘*Reddendo inde nobis debita et servitia tali tenurae generi afflueta, omnium aliorum onerum aut prestationum loco.*’—This clause with us still continues in its ancient office, *i. e.* to specify the return or duty to be paid by the vassal. In military grants, it was the services used and wont. The law and the custom sufficiently supplied the particulars; and each tenure, with us, had a *reddendum* peculiar to itself, which we find to be, for most part, regulated by the covenants of parties. The *reddendo* is the place for expressing whatever is specially due by the vassal to the superior. In England, *the reddendo* has, ever since the statute *quia emptores*, been termed *the reservation*; because the granter has, properly speaking, no other right in the lands which are not held of him, but of the chief lords of the fee. When any thing is due to them, the *reddendo* is in the same style in which we use it. The next is the clause of warrandice.

‘*Quas terras atque alia modo nuncupata, cum pertinentiis, eidem B. et suis, contra omnes mortales et ab omnibus periculis tueri et defendere, me meaque devincio atque obstringo.*’—Upon the clause of warrandice, we have nothing to add to what we observed upon the same clause of the English charter. We shall reserve the modern construction of it for our commentary upon the disposition. At present we have only to observe, that this clause adds further to
the

of old, it was granted in a separate writing, and was only annexed in imitation of the Crown charters. It is termed a *precept*, that is, a *command*; and it is conceived in the highest tone of feudal pride. The superior, like a sovereign, commands his bailies, upon sight of the warrant, to give hereditary state and seifine with real, actual, and corporal possession of the lands and others. We sufficiently explained these words: They are the style of the ancient seifine, and relate to the idea of real possession thereby intended, and not to the symbolical or civil possession afterwards introduced. We shall pass over, at present, the specification of the symbols, which, comparatively speaking, is a modern innovation. The ancient precepts left that matter entirely to be regulated by the known practice. Though the style of the letter of attorney, for giving livery of seifine in England, is to the self same effect with our precept, yet the language and form of the one is modest and natural, when compared with the other. The reason is, that none but the chief lord was entitled to grant a precept. All others under him, in giving livery of seifine, were not acting as lords or superiors, but in the character of simple proprietors transmitting their property. They appointed attorneys to give livery in their names; whereas with us, in Scotland, the power of subinfeudation remained; and each person giving a right to be held of himself, assumed the character and style of a chief lord; and thus the haughty language in the precept of seifine was assumed by superiors of all ranks.

This style was not devised for the purpose: It is copied, both in spirit and in words, from the clerical precept, which the priests used to annex to their deeds for the excommunication of the persons who did not obey the church. These precepts generally began with the words, 'Quare vobis qui super hoc a latore praesentium fueritis requisiti praecipiendo mandamus,' &c. In short, the form of the one precept has been expressly borrowed from the other; and therefore, upon a double account, we are not to be surprised at the high tone of a precept of seifine.

The

charters of subject superiors. The reason is, that Crown charters always have gone into the register of the great and privy seals, and therefore needed no further registration.

Since that time, clauses of registration are frequently added to charters. The act, however, provides, that they are to go into no inferior record, but into that of the supreme court alone. In practice, we believe no register refutes them, where they have a clause for the purpose; but a charter can regularly go no where but to the books of Session; and it is a mark of ignorance in a writer to make them registerable any where else.

In order to complete the analysis of the charter, we return to those additions or amplifications of style, which we find in these deeds before the present century, and which are carefully preserved in our modern crown charters. The first of these we find always added to the *tenenda*; the office of which, as we formerly mentioned, was to describe and limit the estate; and, therefore, the lands are generally mentioned in the dispositive words. Craig, upon the subject, expresses himself thus: ‘What follows in the style of the charter now in use, appears to be rather exegetical, than put in from necessity. Those who are employed in forming charters, never think they can show caution enough upon the part of the receiver; they therefore choose rather to insert every thing specially, than to take a general grant of them; although, if the lands were given, with all their bounds and pertinents, the description would be equally effectual as if a special enumeration was inserted, as is commonly done *.’ Sir Thomas supposes that this clause of style had been the anxious production of modern conveyancing. It is, however, as already noticed, as old as the destruction of the Roman empire; for the identical clause of ‘*cum totis et integris domibus, aedificiis,*’ &c. are to be found in the most ancient charters of Marculfus, and all his successors on the Continent. Spelman thinks, that the idea of this very special clause was taken from Abraham’s purchase, where
not

* S. 30. p. 202.

it was to remove these that the *tenendas* were frequently increased, by giving such specific rights of things along with the lands. Vestiges of these disputes are to be found in our ancient decisions, and in the series of charters in the *Diplomata Scotiae*, where this part of the *tenenda* lengthens by degrees, till it arrives at the modern redundancy. We now go to the clause itself.

‘Cum domibus, aedificiis, boscis, planis, moris, mareis, viis, semetis, aquis, rivulis, stagnis, pratis, pascuis, et pasturis.’ The import of these words has been treated of by our systematic writers, under the title of the right which the vassal receives upon getting a feu. The general rule laid down by all of them, and by Mr Erskine, is, ‘That every thing which from its close connection or adherence to the land, is considered in law as part and pertinent of it, goes to the vassal as an accessory of the subject contained in the feudal grant. Under *domibus, aedificiis*, therefore, are included not only dwelling houses and stables, but walls and inclosures; all which being proper *partes soli*, are carried by every charter.’ The words, however, were not at first without use; for, in our eldest decisions, we find, that sellers of land attempted to carry off the stones of dry walls, and other erections after sale, under pretence of not being cemented. The term *aedificia*, therefore, comprehended every thing of that kind. To these we find towers and fortalices, *cum turribus et fortaliciis*, frequently added in the charters of the crown; and, unless they had been added, they would not have passed with the land. The reason is given us by Craig. ‘They are (says he) parts and instruments of jurisdiction; and jurisdiction appears never to be granted unless when particularly expressed. Towers were first erected, not so much to dwell in, as to punish the guilty, and for the defence of our country: Therefore, unless the jurisdiction itself be conveyed, towers cannot follow, since they depend upon it: But, when lands are erected into a lordship, an earldom, or a barony, then every thing transmits with the universality, and towers among the rest, though
‘ not

not expressed; because these feus have jurisdiction or dignity annexed to them. A tower built by a feuer will follow the ground, if he had the liberty of building one; for with us, towers and fortalices cannot be built without express licence from the Prince, especially such as have battlements or embrasures upon them, *i. e.* *turris pinnatae* *.' Of these our country was in former ages full; and the ruins of them every where remain. They were built, not only for defence against the common enemy, but for the protection of every family against its neighbour. Every house belonging to a man of any consequence was a gloomy turrated fortalice, entered by a draw bridge, and surrounded by a mote, fosse, or ditch of stagnated water, equally unwholesome and inconvenient. From these petty castles, the feudal tyrants often descended like eagles upon the plains around them; and the first piece of revenge taken by a nobleman against another of an opposite faction, was to surprise and burn his house, after having in too many instances put every person within it to death. By the law of England, all these towers and forts were presumed to belong to the King; and it was high treason to refuse, or keep them out against him. Our law was the same: 'For what other reason (says Craig) can be given, why the refusal of a tower to the King should be high treason, more than the refusal of a horse or a common house †.' These manners, and these laws, are now no more. The remains of the ancient fortalices now pass as a part of the lands, under the words *domibus, aedificiis*, without the privilege of barony, and without communicating jurisdiction of any kind.

'Viis et semitis.'—By *via* is understood a private road, or byway, for horses and carts; the ordinary breadth of which is twenty feet. *Semita* is a foot path, to which one estate has right through another, by servitude, for the convenience of the former, which in that respect is termed in law the *dominant tenement*. We shall read Craig's commentary

* Page 152. sect. 3.

† Page 252.

commentary upon these words, because they are instructive. ‘If by
 ‘ ways (says he) we understand church roads, they are *inter rega-*
 ‘ *lia*, and belong to the public. The words, therefore, are to be un-
 ‘ derstood of private ways; for a private man can give only private
 ‘ roads. By *viae* are to be understood those roads which lead to a
 ‘ feu, although through the ground of another. The granter there-
 ‘ by transfers to the vassal, the right as possessed by himself. The
 ‘ same thing may be said of paths. This rule holds, although the
 ‘ ways and paths ly through the lands of the granter; for who dis-
 ‘ pones me any thing, is thereby understood to give me every thing
 ‘ requisite to the free use of it. So, if any body conveyed to me a
 ‘ fountain in his lands, he must also be understood to have given a
 ‘ road to it *.’

‘*Boscis, planis, pratis.*’—*Boscis*, from the Italian *bosco*, is the term
 rather for a thicket than a wood, and, therefore, it would be proper
 so to translate it. ‘*Prata* (says Craig) are as much carried by the dis-
 ‘ position as the *arva*, or arable lands themselves. By *prata*, or mea-
 ‘ dows, is understood such grass lands as had not been cut for ten
 ‘ years before; for a field ploughed is no longer a meadow. At that
 ‘ time no grass was sown; meadows were pastured, and but seldom
 ‘ mowed.’ This is the English understanding of it. ‘*Pratum fal-*
 ‘ *cabile* (says D. Cowel) is a meadow or ground fit for mowing.
 ‘ *Juratores dicunt quod predicta placea a tempore quo, &c. fuit pra-*
 ‘ *tum falcabile usque ad predictum annum quod W. predictus illud*
 ‘ *aravit.*’

‘*Pascuis et pasturis.*’—These words seem intended to convey se-
 parate meanings. The one, *pascua*, is the servitude of grazing upon
 commons; and *pastura*, servitudes belonging to the estate upon the
 grounds of others. ‘The nature and extent of *pascua* (continues
 ‘ Craig) depends upon consuetude; but, if a right of pasturage be
 ‘ granted upon any particular place, it includes the lesser servitude
 ‘ of cutting peat, turf, and other materials for fuel; and so I have
 ‘ seen

* Page 252.

on their territories, their *subjects*, as they termed them, to bake, to grind, and to press their grapes, and to pay heavy duties upon that account. This right of oppression was termed *la banalité du seigneur*; and the mill itself, *le moulin banal*, *la four*, or, *la pressoir banale*. They kept a smith in the parish, and claimed his profits. They licensed retailers of wine in it. They forced their tenants to furnish victuals for packs of hounds, whether they kept them or not. These low and cruel practices, arising from poverty and necessity, seem to have found their way in a body to Scotland, and to have been pushed as far as the situation of things could admit. In our old deeds, and in Balfour's Decisions, we find thirlage to the baron's oven as well as to his mill: We find the exclusive right of smiddies, brewing, ale selling, and every other French species of oppression. Some of these things have fallen off; but the mill and its thirlage still remain in force. The word thirlage is a corruption of *thrallage*, to thrall, enthrall, or enslave. There is a Saxon verb, to thirle. It means to perforate, or pierce. The corruption of the word thrall into thirle, is natural to the idiom of the Scottish language. The word *fuken*, which always goes with mills, is a plain corruption of the word *soccome*, or *socna*, of the English. It carries the same meaning, viz. the thirlage or territory of the lord, or the mill. Multures are from *moliturae*; but we took it directly from the French, whose ancient term for the duty, or quantity of the corn payable at the mill, was *multures*; and the modern one is *moutures*, exactly our own word. The *in fuken*, or allotted multures, are much the same as the *bond soccome* of the English, and *out fuken* as the *love soccome*. Dry multure is an absolute or oppressive tax, laid upon the quantum of the party's corn, whether he grinded or not. 'The iniquity of the masters (says Craig) not content with these things, even introduced dry multure, which they laid upon their people whether they grinded at the mill or not *.' Knaveships are the perquisites allowed to the miller's servants for their work; which, in other places, is called

* Page 253.

'other parts of it, cannot reasonably be accounted for. Only custom has said so, and custom must always prevail *.' Mr Erskine admits the general rule of law, that a 'mill has always been accounted a separate tenement from the lands, without either a special grant of it in the dispositive clause, or the erection of lands into a barony.' So that the words in the *tenenda* go only to liberate from thirlage, but would not carry a mill already built. Mr Erskine, in the place quoted †, combats the rationality of the maxim by a variety of arguments. The fact, however, is, that mills were held to be separate tenements for ages by the common law; and the question is upon what principle that rule was founded. Craig, in mentioning the customs of Normandy, thus expresses himself: 'Among that people, neither pigeon-cotts or mills pass to the feudatory or dispositive, unless they are specially expressed; nor is any person allowed to build a pigeon-house but upon a noble fief.' The commentator upon the customs tells us, that the power of erecting mills and pigeon-houses is an essential requisite in an absolute barony: They are the very marks of nobility and jurisdiction; and, therefore, though a baron feued or conveyed his lands, he was not presumed to part with the privileges of his nobility, or with any part of his jurisdiction, without an express declaration to that effect. Craig had just a little before stated the same doctrine in the case of towers and fortalices, which do not transmit, unless specially expressed in the disposition: 'Ratio est, quia pars et instrumentum sunt jurisdictionis, et jurisdictio nunquam concessa videtur nisi exprimitur, sed semper apud dominium directum permanet ‡.' The same idea applied to the mill, perfectly accounts for that singularity in the common law.

'Aucupationibus, venationibus, et piscationibus.'—Hawking, fowling, or hunting, are now *exegeticae*; though these liberties were, at the time this specification was devised, thought necessary to give to vassals, what superiors were accustomed to arrogate to themselves

even

* P. 253.

† Sect. 5. p. 252.

‡ P. 252.

even after sale. Common fishings in public rivers and the sea were preserved in a manner by nature to mankind in general; but the pleasure of killing deer, and the profit afforded by salmon, attracted the notice of Princes, and were placed *inter regalia*. Salmon always was an article of great moment in Scotland; and therefore practice distinguished between them and the white fish. Salmon fishings in the sea are not comprehended under the general word *piscationibus*. It behoved them to be specially granted. The rule, in white fishing, was, that they belonged to the proprietor of the coast. If he had been in the immemorial use not only of fishing himself, but of preventing others, then the general term *piscationibus* was held as a title sufficient to continue such possession. The public restrictions upon game belong not to this place.

‘*Petaria, turbaria*,’—peat and turf grounds. These are Scottish barbarisms proper to our country. If the ground be a part of the property, they are pure redundancies. If not, the words give only title to prescribe the servitudes upon others.

‘*Carbonibus, carbonariis*.’—Coals and coal-pits undoubtedly go with the land, though the point at first was disputed; and it is certain they are capable of separation, and oftentimes are actually separated. The coal is sold without the land, or the land is sold and the coal retained*.

‘*Cuniculis, cuniculariis*.’—This (Craig says) is to be understood of such warrens as the lands have prescribed a right to at the time; for it is not lawful to erect new open warrens, which are destructive to all the corns around. If new made, they must be inclosed, so as to prevent the rabbits from injuring the neighbourhood.

‘*Columbis et columbariis*.’—The right of erecting pigeon-houses being found destructive to the country, it was restrained by the 19th act, 3d parliament of James VI. by which all heritors are discharged from erecting pigeon-houses, unless they are possessed of ten chalders

* The first mention of coal in Scotland is in the charter of Pittencreeff, published by Mr Davidson, dated anno 1291.

ders victual rent, from lands adjacent to the dove-coat, or within two miles thereof; and, even then, they are not to erect one within the bounds. However, under pretence of repairing, all the old ones built before this act are still kept up, although a single stone of the original ones, especially in towns, be not remaining. Neither the inconveniencies arising from warrens or dove-cots had been known in James IV.'s time; for, by statute 74th, Parl. 6. of that Prince, all lords and lairds were ordered to make deer-parks, stanks, cunningaries, and dove-cots, for the policy of the country. Mr Erskine thinks it lawful for any heritor to make warrens, even without inclosing them; for, (says he), if the act is so interpreted, dove-cots ought to be inclosed, which is absurd. This reasoning is by no means conclusive. The act was made for the improvement of the country, and an inclosed warren is an improvement. To fill open ground with rabbits is destructive; and he might as well say that deer need not be inclosed in a park; whereas none can keep them upon other terms, except the King in his forests. Besides, the old word *varennæ*, from which we have *warren*, is a French term for an inclosure to keep wild animals.

'Hortis, pomeriis.'—Gardens and orchards are here entirely *ex-acticae*, the right of making them never being doubted.

'Fabriliis, brasinis, briveriis;'—Smiddies, forges, malt-kilns, breweries. The last is barbarous law Latin. *Briverium* was also used in charters to denote *beath*, from the French *bruyere*. Because smiddies, kilns, &c. created some resort, and were indispensable in rural affairs; therefore our old superiors arrogated an exclusive right of erecting them to themselves, and were not presumed to bestow them with lands, unless specially expressed, which procured them a constant place in the *tenenda* of charters. Barons, though they cannot now prevent brewing, yet (as we will afterwards learn more particularly) they, like the French seigneurs, prevent the importing or vending of ale within their territories, without their own consent.

'Genistis.'

tary vassals upon their entry ; which present was afterwards converted into money, and ended in the casualty of relief. *Herezeld* was the present made by the heir of a tenant to his master, upon succeeding to his predecessors. In the Quon. Attach. it is defined to be the best *aver*, or beast of his cattle, providing the husbandman possessed an oxgate of land. Lord Kaimes has shown, in his notes, No. 15. that it was exactly the relief due by the heir of a countryman. The words *beriot* and *herezeld* are variously derived. Skene, with much probability, brings the latter from *berus*, a master ; and *zield*, the old word used in our statutes for a gift or tribute. This exaction came to be unfavourably considered, and is now entirely given up ; though, from a decision, it appears to have remained in the custom of some baronies so late as the year 1733.

‘Cum communi pastura.’—These general words carry no more than the right belonging to the lands of pasturage in common with the neighbourhood, upon places or muirs possessed in common, and where custom has adjusted the number of cattle belonging to each. Therefore no grant, liberty, or servitude, is here given by the superior, more than would follow from possession of the lands themselves.

‘Lignis, lapicidiis, lapide, et calce.’—By the word *lignis*, can only be meant those buried trees which in many places, especially of the north, are dug out of the ground, and make the finest of firewood. All these are evidently redundant.

‘Libero introitu et exitu.’—Free ish and entry must, in every case, be implied, and are therefore quite unnecessary.

‘Et omnibus aliis assamentis, cum justis suis pertinentiis.’—*Assamentis* is a barbarous word often found in our old writs for easements or conveniencies. ‘*Pertinentiis*.’ This word is understood as expressive of the greatest part of the particulars in this clause, and of every other liberty, servitude, or privilege possessed with the property itself. The extent of this word has often given occasion to

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Safine.

IN viewing this ceremony, we are always to keep in remembrance the difference already explained between right and possession; and that the delivery, and not the possession, completes the sale. The Roman law carries this very far. ‘Si non voluntate nactus sis possessionem non pro emptore possides, sed predo es.’ A charter, then, gives only the right; the precept carries the will, or consent, of the seller to give the possession. The execution of that precept, or the delivery of the safine, completes the right; and the instrument containing the ceremony is, with us, the only legal evidence of its being performed.

To understand this material solemnity in practice, we shall first analyse the act itself, and then the instrument made out in evidence of it.

The first movement is made by the party, or his attorney, possessor of the charter containing the precept. He requires the attendance of a notary public to certify the act: They next, in virtue of the blank left in the precept for the bailie, choose a person to fill that office, and witnesses to attest the whole fact. Then all of them repair to the ground of the lands described in the charter: When there, the vassal or attorney produces the charter, and desires the notary public, as clerk to the act, to read it. The notary, accordingly, reads it verbatim; and the vassal or attorney desires the bailie to obey the precept, by giving him safine in terms thereof. The bailie obeys;
takes

discussed the persons concerned in this solemnity, we shall next proceed to examine the instrument or document made out, in order to certify the performance of it to the world, and transmit it to posterity.

The Emperor Justinian required all public documents to be begun in the name of God. His own edicts were issued 'In nomine Domini Jesu Christi Dei nostri.' This kind of invocation was not only esteemed auspicious, but it imported an oath by the notary to set down the truth, and nothing but the truth. The next requisite was the name of the Emperor, and the year of the empire; the name of the Consuls, the indiction, month, and day, in this form: 'Imperii Justiniani sacratissimi Augusti et Imperatoris anno post consulatum H. Belisarii clarissimi viri anno 2do, die autem,' &c. The later Imperial notaries retained the invocation of the name of God, adding the Hebrew word *amen*, or *so be it*; which converts the beginning of our instruments into a short prayer. Sometimes they varied the words; and the common form was, 'In Dei nomine;' sometimes 'In nomine Domini Jesu Christi;' or, 'In nomine Patris, Filii, et Spiritus Sancti.' Craig says, that this old practice should be retained; and it has accordingly been so. He complains, that it was sometimes omitted in his days, 'a delectulis notariis.' In Germany, the name of the Emperor, and date of the empire, was also retained; but, in other Christian countries, the clerical notaries, in place of the first, substituted the æra of our salvation, the date of the empire, and of religion; and, in place of the Emperor, the name of the reigning Pope, the father of the universal church. By appointment of the canonists, they also retained the indiction, which is said at first to have denoted a Roman tax, *indictio tributaria*, and to signify simply a period of fifteen years. Some writers assure us, that, by an institution of Constantine, it was adopted as a method of regulating time; because he began them from the defeat of his enemy Maxentius, which was considered to be the triumph of Christianity. This is all conjecture without proof. We
only

‘Ad fundum terrarum.’ Were the safine purely *symbolical*, as writers now term it, then might the ceremony, like the resignation, be performed any where; but that is not the case. We have shown, that it was originally real, and that both the symbols and the possession were required to complete the right; consequently, it behoved safine to be given upon the ground, and no where else. When the actual possession ceased to be a requisite, and civil possession took place of it, still the safine was given, and must be given, upon the ground of the land; for ceremony and forms follow not the changes of ideas, nor the revolutions of the law: They change slowly; and the present is an instance of that axiom.

In place of the special power of attorney formerly used, the notary takes that circumstance upon himself; and, in fact, presumes it from the possession of the warrant, which the attorney is supposed to have previously produced to the notary as his own authority, and to the bailie as the warrant of his appointment. When got upon the ground, the attorney is described, ‘Habens, et in suis manibus tenens, quendam chartam originariam per D. H. concessam per quam, ob causas in eadem expressas, dictus D. H. vendidit et alienavit,’ &c. Here the charter is recited shortly, *i. e.* the lands alienated are described; and, in order to supply the recital, the general rule is followed, of referring to the charter itself. Some safines in the last century, and several we have seen in the present one, recited the charter almost verbatim, mentioned the *quaequidem*, the *tenenda*, and the *reddendo*. This betrayed the ignorance of the notaries, who did not know the nature of the instrument. The *premises* of the charter, or other warrant, comes with propriety into the safine; and nothing more is required except the precept. The instrument proceeding upon an express warrant is only a part of the investiture, and makes no further mention of the warrant than is sufficient to explain the delivery of safine, or is relative to it.

The instrument next declares, that the attorney so authorised requested the bailie to execute the office committed to him, and, for
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out the attest, it would be no deed. When this happens to be the case, notaries generally take in the precept and every word of the deed that follows. This is safe, but often clumsy; and the separation is easily made. The charter is only shortly recited, but the precept verbatim; because, when separate, the charter was not necessary; and now, when joined, the precept still is the sole authority for the safine. In the separate precept, the charter, if granted before, was either recited; or, if to be granted, the terms were referred to. When the precept was ordered to be annexed to the charter in the abrupt manner it now is, the recital of the charter becomes a necessary prelude to the instrument. Craig informs us, that, in his time, some notaries officiously inserted the whole charter in their instruments, and others omitted even the precept. To these last, he is of opinion, no faith should be given. The fixed practice, in this case, now is, to recite as much of the charter as to render the precept intelligible, and to insert every word of the precept. The parts of the charter narrated are the names of the superior and vassal, with the destination of the vassal's heirs, the species of the charter, (*i. e.* the characteristic of it), the lands granted, and the conditions (if any) of the grant. The recital is closed with a general reference to the charter itself. The date is always referred to, because it makes a part of the precept, and enters the safine of consequence. In the case of Lady Lammington, 23d December 1680, the Court sustained a safine in which the precept was not engrossed, but reference only made to the warrant. From that decision, however, it is plain, that a regular safine would have been preferred to it in a competition; and the Lords called for the notary, to deprive him. The safine ought at once to have been found null.

The instrument then relates the essential part of the business thus:

‘ Post cujus quidem safinae praecepti, supra mentionat: Perlectionem,
 ‘ publicationem, et explanationem, praefatus D. R. tanquam ballivus
 ‘ antedictus, virtute ejusmodi et officii ballivatus sibi in hac parte,
 ‘ comissi, statum, safinam hereditariam, pariter et possessionem ac-
 ‘ tualem

common, parties are said to take instruments, which is mistaken for the requisition of the notary; and, indeed, for the most essential circumstance of the whole. *To take instruments*, however, is no more than to require that the facts then passed in presence of the notary should be set forth in the form of an instrument; for the notary was required to act, and had performed every thing before that incumbent upon him; but, though obliged to act when required, he is not obliged to make out instruments, unless paid in part, at least, before hand. Hence the common adage, 'Nullum instrumentum sine argento.' Besides, he must appear to do nothing of his own accord; every thing ought to be required of him, and his services furnished with perfect indifference.

The whole is concluded with an attestation, or testing clause, repeating, that every thing had been done upon the ground of the lands, of the date before mentioned, in the presence of witnesses. The hour was, and still is, commonly set down, in order to shew that nothing was privately or clandestinely done. Safines, however, are, in a decision to be just mentioned, said not to be like execution of diligence, or other matters in which third parties, or the public, have a right, and which must pass under broad day. The subscription of deeds, the delivery of moveables, and all other private acts, are good, though done without day light; and, therefore, the Court, in the case of Arnot, 29th November 1679, collected by Lord Stair, sustained a safine taken at 9 o'clock at night, under cover of night; but then no fraud was qualified, and possession had followed on it.

It was mentioned, that safine was originally given in presence of the *pares curiae*, and afterwards in presence of any witnesses in the neighbourhood. No number was determined on by the law; and the old instruments generally contain a great many. They are always mentioned to have been specially required to witness this ceremony; for their accidental presence was not enough, unless they were attentive to what passed. As witnesses did not, for a long course of years, subscribe, the assertion by the notary of their having been specially

A notary was only to be trusted in matters obvious to the senses. 'Hoc monendum puto (says Craig) ut nulla notario fides adhibeatur de iis, quae sub sensus non cadunt.' Hence the words of the docquet, '*vidi, scivi, et audiui*;' and in a case where the want of these words was objected to a safine, the Lords, in respect thereof, voided it *. What he then saw and heard he put down in notes; '*ac in notam cepi*;' and from that note he asserts the instrument to be made out. By the custom on the Continent, it behoved notaries (as Craig affirms) to write the instruments with their own hands; but this (continues he) is with us frequently committed to others. It is then necessary that the notary should say so, which he accordingly does in these words: '*Et hoc praefens instrumentum manu aliena conscriptum, me aliis rebus occupato, exinde confeci*.' These, or similar excuses, are to be found in all the ancient Continental docquets. He also affirms his being specially required to attend the affair; and such requisition is expressed in the instrument. '*Quod (says Craig) utque adeo necessarium, ut sine eo safina non est*.'—'*Non enim debent notarii non volentibus se insinuare aut instrumenta capere*.' But (continues he) there is this difference between the requisition of the witnesses and of the notary, that the latter must always be expressed, while the former is often presumed.

The ancient notaries observed a practice, which conveyancers have still kept up in the execution of deeds, and which notaries have very absurdly and improperly left off in their instruments. If a word happened to be erased or interlined in an ancient instrument, the notary added a distinct declaration of the fact to his docquet, with more precision than we do our marginal additions, or other alterations, in our writings. The first of these docquets we have met with is as old as the year 1288. It is the work of a Spanish notary, in the execution of a bond by Edward I. to the King of Arragon. After the docquet, he adds these words: '*Ego vero predictus notarius in decima quarta linea in istis*

man law had recourse to notaries against the frauds of private writings. Our practice recurred to private writings, as guards against the malversation of notaries; for without a written precept, or the concurrence of the private party, no instrument of *safine* bears faith.

Having now gone through the most primitive form of the instrument of *safine*, as it subsisted in Scotland, without any regulation peculiar to the country, let us next take a view of the alterations it has undergone, and the laws which occasioned them. It was formerly noticed, that the seal and subscription of parties were, by an act of the 6th parliament of James VI. required to all writs of importance; and, if the parties could not write, they were to be executed by two notaries, before four famous witnesses. Though this act related to private deeds executed between parties, yet a doubt arose whether or not it was necessary to execute *safines* in the same manner, which, in experience proved burdensome and expensive. To clear this doubt, a clause was added to an act, anno 1584, c. 4. declaring, 'That the act 1579 should not be extended to instruments of *safine*, whereunto ane faithful nottar, with an reasonable number of honest and famous witnesses, is sufficient.' However, as four witnesses were mentioned in the preceding act, and (as Craig says) had always been usual, and no number were specified in the correctory one, a notion prevailed that four witnesses were the reasonable number necessary in *safines*; and four witnesses continued accordingly to be adhibited in the generality of cases. St Martin says*, that four witnesses, at least three, are requisite. At last the objection was judicially made; and the Lords found, 15th July 1680, that no more than two witnesses were necessary in instruments attested by one notary. At that time witnesses did not subscribe deeds; and for a good original reason, because few could be found capable of doing it. By the important act, anno 1681, c. 5. the subscription of witnesses was required to all writings; and, particularly, it is enacted, that, 'in regard writing was then common, none but subscribing witnesses should be probative in instruments of *safine*,

* Page 38.

In extending the instrument, the variations are not great. 1st, In place of a bailie, the superior of the lands, and granter of the charter therein recited, appears; also the person to whom, and in whose favour the same is granted. 2^{do}, In narrating the warrant, the date is specially set down; because, in other instruments where the precept is engrossed, the date is inserted as part of the precept, and referred to in the previous recital.

Next, it is said, 'Which charter (no mention of the precept) the said A. B. presented to the said C. D. praying him to give safine of the lands thereby granted *propriis manibus suis*.'—Then, that in execution or completion of the grant by the said charter made, the said A. B. gave and delivered, *ex propriis suis manibus*, heritable state and safine, by delivering into the hands of the said C. D. &c. according to the form, tenor, and intendment of the said charter in all points. Where there is no antecedent charter, or other conveyance, to instruct the intention of the party to grant an heritable subject to another, an instrument of safine *propriis manibus* has, by a long series of determinations of our courts, been held to be improbative and insufficient. It is no more than the bare assertion of a notary, that such a man divested himself of his property, and gave it to another, without any evidence of the proprietor's consent; 'non creditur re-ferenti nisi constat de relato.' Of old, in place of an instrument, it was the practice for the superior to give a testificate of the fact under his seal and subscription, if he could write. The form of these attests has been preserved by Balfour, and came formerly under our consideration. In place of separate testificates, a more commodious method was afterwards introduced, of the superior signing the instrument along with the notary. It has been thought, that this form was suggested from the analogy of the act of Queen Mary, anno

'fectarum, ac contractuum, per oratores et ambassiatores utriusque principum antea super eisdem initorum, per terrae et lapidis fundi ejusdem traditionem, ut moris est, et in talibus fieri consuetum, dedit, contulit, pariterque donavit.'—*Rhymer, vol. 5. part 1. p. 199.*

head, that the giver of a safine *propriis manibus* should subscribe the instrument in presence of the witnesses; and, in that case, an addition is made in these, or equivalent words: 'And further, the said A. B. in testimony and support of the several facts before related, has, in presence of the said witnesses, subscribed this instrument on the day, and of the date hereof.'

Before quitting the original charter and safine, it is necessary to discuss some circumstances which properly belong to the subject, particularly *the remaining symbols used in infeftments*.

We formerly mentioned the origin and necessity of this typical possession; and that, to prevent the confusion of symbols used by our forefathers in Scotland, earth and stone were at last fixed upon as the constant and unalterable type or figure in the safine of lands. Earth and stone were the most general symbols used with us. The creation of the various orders of nobility, the grants of jurisdiction, and the appointment of the clergy, gave rise to a number of symbols, such as imagination suggested, to bear some resemblance or allusion to the nature of the grant. At present, our business is the common and usual ones used in infeftments of property. Mills were considered as separate tenements, and consequently needed separate infeftments to distinguish them. Notaries invented the form of putting the clap and happer, or upper part of the machinery, into the hand of the purchaser, or his attorney. This was natural enough; for, as it is the machinery which makes the mill, and brings the profit, the part of it most visible was no doubt the best symbol. There are now variety of mills, to which the same rule will no doubt apply; but it is adviseable, in every case, to add the fundamental symbol of earth and stone to that of the machinery.

Fishings also require separate safines, and, in the same manner, are executed by delivering a net and lines. If it is a salmon-fishing, by cruives; and the heck is generally added. The property of ferries, when accustomed to be separately considered, is conveyed by the symbols of a boat, or water and an oar. When fortalices were held,

is null. By opposite, we mean staff or baston, which are the symbols of divesting superiors or granters of the fee. And so the Court found, 1684, Murray *. Neither will the use of general words be sustained, such as that *safine* was given conform to the precept; for that would be to dispense at once with formalities altogether. There is one rule which must always be observed, that no person can be infeft by any general designation. The precept must always command a certain person or persons to be infeft, and the instrument must be equally specific. Thus Kilkerran reports, that, upon the 7th November 1740, a *safine* was found null, in respect it proceeded upon a precept for infefting the representatives of Robert Colvill and Andrew Russell, without particularly naming and designing these representatives.—Blackwood against the Earl of Sutherland.

Such is the late effect of this symbolical representation of the act and possession, that, according to the practice since the establishment of registers, they cannot be supplied by natural possession itself. ‘*Nulla safina, nulla terra,*’ is one of the established axioms of the law of Scotland; and the instrument is determined on as the unalterable evidence of such symbolical possession. It is rendered so necessary to the perfection of the right, as not to be supplied by any other means of probation; for, as Lord Stair strongly lays it down †, ‘though the superior, with a thousand witnesses, should subscribe all the contents of a *safine*, it would be of no effect without the regular attest of a notary.’

The great argument for a strict attention to forms, particularly in the material business of *safines*, is this, that, however the Court may have held some of them light in appearance, there is no reliance to be had upon such decisions. A deed or an instrument will be sustained in some cases, where no better ones are opposed to it; but in a competition with others possessing more formal rights, it will be postponed. In favourable cases, omissions, blunders, and informalities,

* Bankton, vol. 1. pag. 550.

† Page 207.

lawyers, particularly Mackenzie, held, that the Sovereign alone could bestow such a privilege, or exempt lands from the common rules of law ; and so it was determined by the Court upon the first opportunity *. We reserve the further explanation of the *union*, until we come to treat of Charters from the Crown.

Registration

* Jan. 16. 1623 ; and Jan. 16. 1728.



ber of our earliest statutes, no mention is made of their protocols till the 77th act of the 6th parliament of James V. anno 1540, when the privilege of giving sasines upon the precepts of chancery was taken from common notaries, because their protocols were often lost, which proves that these books were held to be a register of sasines. By the 43d act of the 6th parliament of Mary, anno 1555, 'the whole notaries of the kingdom were ordered to produce their protocols, in order that they might be marked by the Lords, the leaves numbered, and the blank marked in presence of the notary.' This act further proves, that the protocols of notaries were held as records of instruments, to which, upon their loss, parties had recourse. The marking of the leaves by the judges was to prevent the notaries from altering, or adding, *ex post facto*, to their protocols, which, in this situation of the business, appears to have been a very proper regulation. Cautioners were also taken at the admission of notaries for their proper behaviour; and, by the 45th act of the 11th parl. of James VI. anno 1587, it is statuted (as on the Continent), 'That these cautioners should be bound, within fifteen days of the notary's decease, to bring their protocols to Edinburgh, to be kept in the King's register; and the clerk of register is ordained to satisfy the relict and children of the notary for the books, and to make the same patent to all the lieges.' In the King's register they were intended to lie as a check against false instruments, and as an aid in making up true ones which had been lost; which (as M'Kenzie observes) could only be done by action before the Court of Session.

This act, it seems, did not receive execution, principally owing to the Clerk Register being obliged to satisfy the representatives of notaries for their protocols; and therefore, by the 22d act of the 22d parliament of the same Prince, anno 1617, that part of the former act, respecting satisfaction to be given to the representatives of notaries, is discharged; and they, and all other persons having possession of the books after the decease of notaries, are appointed to bring the same to Edinburgh, and deliver them to the Clerk Register, or his depute.

notaries, which were never intended to publish deeds, and which no laws had been able to render of any use, even to private parties. A good description is given in an act of the same year. It is there said, 'That his Majesty's lieges had suffered great hurt by a number of the protocols being vitiated and destroyed, by riving out of the leaves, inserting leaves of new paper, falsifying instruments thereupon, and altering the dates of others.' In this situation, it was certainly high time to think of an effectual remedy; and, indeed, an excellent one was devised, which has ever since blessed the people of this country, and distinguished its jurisprudence*. The idea and principles upon which this excellent statute is founded had long before been floating in the minds of our legislature; and we have heard the several abortive attempts to give them birth.

By this time, the idea of civil possession had taken place in Scotland. The symbolical possession was held to be good, independent of the real, actual, and corporal. We will, therefore, perfectly understand the force of the words of the act, by recollecting, that, in every case, the sasine vested the right; nay, the first sasine upon the last charter, was preferred to the first charter and the last sasine; so that opportunity was then given for the commission of every sort of fraud in the commerce of land property. There was no method by which purchasers could learn with certainty what sasines had been given, or rights previously established upon the property for which they were parting with their money. Into this dilemma our ancestors were led by the alteration of their ideas of the sasine. While the ancient, real, and corporal possession was adhered to, purchasers could learn the state of the land, in a great degree, from the natural possession and the public notice occasioned at the delivery thereof. But now, that the sasine was separated from the natural possession, a door was clearly opened to fraud without end. A remedy became indispensably requisite, as society could not have existed, or at least all commerce in heritage or land must have ceased. This forced

* 22d Parl. James VI. c. 16.

~~In~~ a manner into a public record for the publication of sasine, and, ~~as~~ we have heard, ultimately produced the celebrated statute we are now analysing, which forms one of the most celebrated æras in our law. Two registers are by this act appointed; a particular one in the most convenient place of the several counties, and a general one at Edinburgh, so as to answer every case and situation of parties. By the former act, forty days were allowed, which are extended to ~~fixty~~ sixty from the date of the sasine. In the event of neglect to register the sasine, it is not to affect the rights of third parties in any shape. It was for the benefit of third parties that the last of these acts declared the sasine null if not registered; but this was going too far. No publication was necessary in a transaction with the granter or ~~disponer~~; and therefore a sasine, whether registered or not, remains good, in every question respecting the lands, against him and his heirs. Of this we shall speak more particularly. To render this institution of more use, it is declared, that the extracts from it are to have the same faith as the principals, except in the case of ~~impro-~~ ~~bation~~, *i. e.* when the principal is judicially quarrelled as a forgery; ~~in~~ in which event it must still be produced.

The Clerk Register is appointed to transmit books numbered and ~~marked~~ by him to the several keepers in the country; and, as soon as the same is filled up, they are bound to transmit them to the general register at Edinburgh; which is, in other words, no other than furnishing them with protocols. The mode of registering also prescribed is, that they are to engross the whole body of the writ; the reason of which is, that all the lands or other proper and select qualities and conditions, and real state of the sale, may appear upon record, and no third party be deceived by a second treaty. That mistakes or improper delays might not be occasioned by the keepers, they are ordained to register the writ, and redeliver it in forty-eight hours, marked with the date of the registration, and the number of the page of the register itself in which it is to be found. The only exception from the statute is the property within

within royal burghs, the reason of which will be explained in its proper place.

Let us now attend to the difference between the registration of a sasine and a personal bond, or other writ, containing a clause of consent. The latter is a decree of registration; and, like other decrees, is for the most part a warrant for execution. The deed, therefore, must remain as the warrant of that decree, and an extract only is given to the party. The registering of a sasine is no more than a statutory requisite, intended more for publication than preservation. It is therefore redelivered to the party, marked when and where it is registered; because the register is necessary to its validity. That validity is apparently given by the keeper's attest; and, if parties are not satisfied, the attest or memorandum puts it in the power of all concerned to consult the record, and satisfy themselves.

We shall now consider the effect of this statute upon sasine. By the former law and practice, the date of the sasine determined its preference against third parties; but, after this act, due registration, within sixty days of its date, became necessary, to give the sasine effect in all questions with strangers; consequently, a sasine, or other right posterior in date, but registered in terms of this statute, became preferable to a prior sasine not registered. In the event of such an instrument being lost, an extract from this register is held equal to the principal in all cases but that of forgery. In order to take advantage of this exception, forgery is always alledged, when the rights of land are quarrelled. The deeds registered in virtue of consents are retained in the record, ready at all times to meet improbation; but sasines are returned to the party. An extract, therefore, being only taken from the copies engrossed in the register, will not do in an improbation. To supply the defect there are several methods. If the notary and witnesses be alive, he, from his protocol, may give out or extend a second instrument. If he refused, the party had, of old, an action both against him and the witnesses, and all concerned, termed *a process or summons of extension*, concluding for

who had not a better right to produce, or an interest in the omission. Craig, however, in the latter part of his work, mentions a case, the King's Advocate against Kenneth M'Kay, in which a sasine not registered in forty days was held to be null, in terms of the statute 1600. In his *Diegesis de Sasina*, no such requisite is mentioned, being written, no doubt, before the act 1600. He died in the 1608, about the time that the establishment of the public registers was probably in agitation, which removes the obscurity arising from these passages. A sasine of this kind being good against the granter and his heirs, it is also good against his personal creditors; for the sasine is at least a real right *. It is good against tenants, and all others not pretending right to the property, and consequently having no interest in the matter of registration; on the contrary, their right is founded upon that of the proprietors †. For the same reason, it is good against vassals, and has ever been sustained as a title in a reduction ‡. Neither will a preferable right in the person of the heir of the granter affect the unregistered sasine, because it must have place against him even by the statute 1617, which first afforded the objection.

Having distinguished this act as an æra in the history of our titles to land property, we now proceed to the several laws and improvements which have since been made in the matter of registration of sasine. In practice, the Court of Session did every thing towards the establishment of the act 1617, having decided every case by that rule, excepting one instance of the town of Leith, where sasines being long accustomed to be given by registration in the books of the town-clerk of Edinburgh, they sustained that practice as sufficient to bring Leith, which is not a burgh royal, under the exceptions allowed to burghs royal in the statute. The register being thus instituted for the benefit of the public, experience soon pointed out the inconvenience of perusing almost a whole record, in order to procure

* 21st July 1638, Rowar.

† Duxie, 24th March 1626, Gray.

‡ November 1678, Dalmahoy.

ture information respecting a particular estate. Therefore, to render this business of searching easier, a regulation was made in the 1672, which, *inter alia*, ordains an exact minute-book to be kept, containing the date, names of the parties, and designation of the lands of each sasine, which is to be signed by the keeper. From this act, it is plain that the statute 1617 was very lamely executed by the record keepers, who, it seems, in place of redelivering the principals in forty-eight hours, had them lying in their hands untouched for the space of forty years. The disorders consequent upon the usurpation were, no doubt, some excuse for part of this inattention; but the neglect was scandalous; and therefore the care of the business was by this act, in place of the Clerk Register, committed to the Court of Session.

Though these minute-books proved extremely convenient to the lieges, and were indeed indispensable in the use of the records, they were soon made subservient to abuse. The keepers, upon the writs being presented, entered them in the minute-book, and often gave them back with the common attest of their being recorded without actually inserting them in their books; a practice destructive of the system of registration, so beneficial to the country. The rudeness, the want of cultivation among the people of this country in the two last centuries, is no where more strongly marked than by the little respect or attention which seems to have been paid to the statutes of our legislature. It required three, sometimes four repeated acts, to procure any kind of obedience; and, in the mean time, the crowd of the disobedient, or at least of the negligent, were to be indemnified. The innocent or obedient were often misled by example, and involved in the consequences, which accustomed our court, in their decisions, to pay more attention to the cases of individuals, than to the general rules of law. The same bias often swayed our legislature, of which we are now to give a striking instance. The case of a certain number of private people suffering from the neglect of the record-keepers, occasioned an act of Parliament, c. 19. 1st Parl. James

VII. which enacts, 'That where sasines and other writs are presented to the keepers of registers, and delivered back to the party, bearing a record and attestation, under their hand, that the same are registrate, it shall make the same sufficient and valid for the security of the party, albeit by the negligence or omission of the keeper of the register or his deputies they should not be found booked or insert in the register.' The security of the public ought to have attracted the attention of the Parliament in the first place: The indemnification of individuals was but a secondary consideration. Instead of that, the legislature, forgetting at once the intendment of the institution of registers built up by their forefathers, by one inconsiderate act, overturned the whole fabric. If the instrument was not recorded in the books, what could the public learn from the record? And, on the other hand, if the writ happened to be lost, where was the private party to get an extract? At the same time, this inconsistent statute gravely declares, that it should in no shape derogate from the act 1617.

The minute-books appointed by the regulation 1672 were irregularly kept, and were not chequed by collation of the officers there appointed, consequently they remained alterable at pleasure. The Court of Session, therefore, in aid of the act 1672, made an act of sederunt, enacting, that the keepers of the registers should, immediately upon receiving the writs, enter the same in their minute-books, and that such entry should be signed by the presenters of these writings. This act was excellently calculated to remedy the evils mentioned in it; and, therefore, an act of parliament followed in the year thereafter, containing additional regulations *. By those regulations our minute-books received two capital improvements; first, that the minute should be made out the moment of its presentation; and, secondly, that it should be signed by the person presenter. The day, and even the hour of the day, is appointed to be put in the minute, and the keeper to sign at the same time with the presenter, whose

* 1st Parl. William and Mary, c. 13.

' it be duly booked, and insert in the register.' At the same time, this act continues in force that part of the statute 1617, which gives damages to parties injured against the keepers, for their neglecting to insert their writings in the records.

Thus was the system of registration in land rights brought to perfection; and the kingdom continued to enjoy the good effects resulting from it at home, and the honour of the invention abroad. Nor did any further improvements appear to be necessary: Only, a slovenly practice had crept in among the record keepers, of leaving out of the record a part of the notary docquet, because the style was always the same. The Court, however, not to suffer the least deviation from the statute in this affair, corrected that error by an act of federunt, 17th January 1756. The Court, in this act, do not void the instruments improperly recorded; they only declare, that they will find the registration to be null: As they do not say it is, *de facto*, to be; so the objection is retained in their hands, applicable to such particular cases as they judge proper.

Forms.

Forms of Voluntary Alienation.

THE property being now vested in the vassal by charter and *safine*, duly registered, we are next to inquire into the methods by which the same property can be alienated by the vassal in favour of another. The methods in our law are two, viz. by resignation and confirmation. Resignation is of two kinds, either in favour of the superior himself, termed *resignation ad remanentiam*, or in favour of a third party, called *resignation in favorem*. We shall examine these in their natural order. Supposing that the superior chooses to repurchase his property from the vassal, and the vassal agrees, the method of dissolving their feudal contract, is by resigning the lands, or, properly speaking, the *dominium utile* thereof, into the hands of the superior, to remain with him forever, *ad perpetuam remanentiam*. As the charter and *safine* are the deeds which constitute a feudal right, by the consent of the superior or vassal, so the resignation is the method of dissolving that consent, of extinguishing the grant, and returning the whole property to the superior in the same situation it was at first. We are first to inquire how this matter was managed of old, and then there will be little difficulty in understanding the principles of the later form.

We have already explained the ancient, and the original, meaning of resignation. We showed, that neither the form nor the language belonged to the System of the Feus, but existed among the Romans of Gaul at the irruption of the Barbarians into the Western Empire, and

was

was only afterwards appropriated to the feudal customs, to which they were of themselves excellently accommodated. We mentioned, that the *festuca*, the *rod*, or *baston*, was the ancient symbol of the delivery of lands in sales by the Roman inhabitants, and that, *de facto*, it is not a feudal symbol. When a proprietor chose to settle the succession of his estate, or to convey it effectually to another, he resigned it to his Sovereign, or other great man, in order that his, the resigner's, heirs, or the purchaser from him, might enjoy the property in virtue of a grant from the Prince, which was esteemed a firmer and better right than could be got from any private man.

Upon the establishment of the feudal law, this form coincided with the principles and ideas of that system. The property of the land was held as remaining in the superior, and the use or possession of it conveyed by the grant to the vassal. The vassal could not alienate his lands, or substitute another person in his own place, without the consent of the superior; and, when he did consent to receive a new vassal, it behoved that vassal to take the lands from no other person but the superior himself. At the same time, the superior could not give the lands to another, until his connection with the former vassal should be dissolved, and his right to the land extinguished. Nothing, then, could be more simple, than that, for this purpose, the vassal should return the subject of his grant to the superior who gave it; and a better form could not be devised than what the ancient practice suggested, viz. the resignation by the rod or baston. The ceremony of doing this gave an opportunity to the vassal of performing an act of great reverence and humility to his lord; and, consequently, the pride of the latter was highly flattered upon the occasion. As the first grant was termed the *sasine*, so this resignation came to be termed the *dis sasine*. If the resignation was made merely to dissolve the connection of the parties, and extinguish the former grant, the vassal instantly quitted the possession, and the business was at an end: But, if the resignation was made for the purposes of the substitution of another vassal, the superior delivered the rod or baston

in England, the real estate, in cases where the property had been purchased, was held to be in the vassal; and the right of the superior to be no more than a reservation of the services. Accordingly, what we continue to call the *reddendo* of a charter, is, with them, termed *the reservation*. Hence the resigner, in the foregoing deed, calls them 'My lands;' and, what proves this idea, he converts his *quondam* superior into a vassal, by reserving to himself an annual payment out of the lands resigned*. The method of effectuating the business was to return the charter formerly given. This appears from the following deed of surrender by a vassal to his superiors, the monks of Bordeſlie †.

As the estate of the tenant flowed from the lord, the deed by which he gives back the lands is termed *a surrender*; because in this sense the superior's estate in the land is considered as the original; but, in regard it is one estate in which both are concerned, no *ſaſine* is necessary. On the other hand, if the superior was to give up his estate to the vassal, the deed is termed *a release*, because it clears the other of the burdens incumbent upon it, or the reservation out of it; and the tenant being already in possession, needs no further *ſaſine*. These are plain, obvious principles, perfect in theory, and easy in the

et assignatis suis, in perpetuum, totam terram meam in Belgrave quam ego de eodem
 * Rogero tenui, cum omnibus suis pertinentiis in toftis et croftis, in pratis et pascuis et
 aliis, (exceptis duabus acris colendis, quas Galpidus Blundus de me tenet): Et ego
 † Laurentius et haeredes mei istam resignationem et quietam clamationem predicto Ro-
 gero et haeredibus suis et assignatis, contra omnes mortales warrantizabimus.'

* 'Pro hac vero resignatione et quieta clamantia et warrantizatione, dedit michi:
 dictus Rogerus viginti et octo mercas sterlingorum, et dabit annuatim ipse vel haere-
 des, vel assignati sui michi et haeredibus meis unum obolum in vigilia Pentecostes.'

† 'Sciant praesentes et futuri, quod ego Williclmus Reston reddidi et omnino quie-
 tam clamavi de me et haeredibus meis, monachis de Bordeſlie Dominis meis, totam
 terram quam de ipsis tenui apud Warewicum extra portam del West, pro salute ani-
 mae meae et antecessorum, et haeredum meorum. Et quoniam cartam illam quam de
 eadem terra de monachis habui, simul cum terra, reddere non potui, nolo ut contra
 predictos monachos aliquem locum habeat si quis per eam in posterum predictam ter-
 ram calumpniatus fuerit.'

nor of the *dominium utile* being consolidated with the superiority but the property is simply resigned to the lord and his heirs, to be disposed of at their pleasure, just as any other purchase would be.

When the *fasine* was anciently given, it was said on a former occasion, that certificates of the ceremony were granted by the lord or by his bailie. The surrenders are no other than certificates by the vassals, of their resignations having been made by them to their superiors. Afterwards, when instruments came to be used in *fasines*, they were also introduced in resignations; and, like the others, were at last held as the only essential and legal proofs of the ceremony. Accordingly, Sir Thomas Craig, without enquiring into the original or the history of this business, lays it down, that 'the fact of the resignation cannot be proved by the writings of either party;' (and for this he uses the very same arguments as in the case of the *fasine*.) 'A renunciation (says he) cannot be presumed nor proven by the confession of the party, no more than if a person was to declare in writing that he had given a *fasine*, which perhaps had never been given; for it is much easier to write than a thing is done, than really to do it. Therefore, in these cases, a public act should intervene, which can only be proved by a notary and witnesses.'

By the feudal law, adopted in Scotland at a later period, the property of the estate is supposed to remain wholly in the superior notwithstanding his grant to the vassal. The vassal got the possession, and entire use of the lands, which, in fact, is a much superior estate to that remaining in the lord. In formerly examining the principles of these rights, it will be remembered that many difficulties arose. This confusion, or opposition of ideas, pervades the whole forms of the writs constituting our titles to land property. There is no broad general principle for regulating the system, and to which in difficulty we might recur. Sometimes the language of our forms supposes the property to remain complete and absolute in the superior, notwithstanding his grant to the vassal. Others, on the contrary

contrary, proceed upon the idea of his being divested of a reality in favour of the vassal, which he cannot alter or affect unless he be formally reinvested.

The first of these suppositions relates to the feudal principles in their original purity ; the latter to the declension of that law, when feus became hereditary, and the right of the vassal rose into importance. Without adherence to the one or the other of these positions, practice has by degrees introduced, and the law, from expediency, has established a *lex investiturae*, essential to the constitution and transmission of our land property. It is our business to treat of the progress of our derivative rights, together with their essential forms, as now established by the law and practice of investiture, marking, as we go along, the principles upon which they are founded, without any attempt to reconcile them. Though a vassal could not alienate his feu to a stranger without the concurrence of the superior, he might dispose of it, or return it to the superior himself. The form of the resignation plainly supposes the superior to have been divested of the *dominium utile* by the sasine of the vassal ; and, therefore, that a real delivery is also necessary to divest the vassal, and reinstate the superior in the full right of his original property.

Craig thus describes the ceremony requisite : ‘ The vassal appears either in presence of his superior, or his lawful procurator empowered for that purpose, with a rod or staff in his hand, accompanied by a notary and witnesses ; and there, with all becoming reverence and humility, upon his knee he expresses himself in these words : My Lord Superior, I here resign and simply renounce in your hands my lands of ———, in order that the property thereof may be consolidated with the superiority, and both remain forever with you and your heirs. After which, he delivers the rod to the superior as a symbol of the resignation, whereupon the superior ought to demand instruments from the notary *.’ The resignation is then, in its nature, a redelivery, and a sasine in effect. The difference:

* Page 432.

difference is, that the symbol, in place of earth or stone, is a baſton; and, in place of being done upon the ground of the land, it is done to the ſuperior in perſon, wherever he happens to be. Craig, and all our writers, have omitted to explain theſe ſpecialities. They are, in fact, remainders of our ancient law, and are not to be underſtood upon any other principle than that of the Engliſh ſurrender, *i. e.* where a leſſer eſtate or intereſt in the ſame land is returned to; and merges in the greater, by the formalities of the ſurrender. In our ceremony, and according to our feudal ideas, the *dominium directum*, as it is the radical, appears to be the capital right; and the *dominium utile* no more than a burden upon it, which is more eaſily given up than at firſt conſtituted. The purpoſe of the ſurrender is, that this right may be conſolidated, *i. e.* united or incorporated with the *dominium utile*, which is juſt the Engliſh phraſe in other words, viz. that it may be merged, drowned, or ſwallowed up, thereby re-inſtating the ſuperior in the exact ſituation he ſtood in, prior to the grant. So much, however, do we conſider the reſignation to be a new ſale or delivery of the lands, that a renunciation, being a private act of the party, without the intervention of any public ceremony, is not ſufficient to divest the vaſſal of his *dominium utile*, or conſolidate it in the perſon of the ſuperior. If this was admitted, (ſays Craig), innumerable inconveniencies muſt follow: ‘The whole forms of Chancery would become uſeleſs; no man could, with certainty, buy, ſell, exchange, or grant, ſince any of theſe acts might be defeated by a private renunciation *.’

Lord Kaimes, in his lateſt volume, has given an elucidation of this point. Article 11. holds the *dominium utile* to be no more than a ſervitude upon the property, which may be extinguished either by a reſignation *ad remanentiam*, or by a ſimple renunciation. This is contrary to practice. The *dominium utile* is ſomething more than a burden upon the property; it is conſidered in the law as a ſeparate eſtate; and practice has therefore determined that a ſimple renunciation

* Page 439.

not consonant to the importance of the transaction ; and therefore an act was made to remedy the error in the 6th Parliament of Mary, anno 1555, declaring, that when resignation *ad remanentiam* was made by a procuratory, that deed should be sealed and subscribed by the resigner ; or, if made personally, that the instrument should in like manner be sealed and subscribed by him ; and, if he could not write, the deed, in each case, was to be subscribed by a notary leading his hand at the pen.

This act, like many of the laws in that unsettled reign, though well devised to remedy the evil, was not attended to or obeyed, and irregularities rather increased. In April 1563, a case stands in Balfour, decided in terms of the statute, in the case of Agnes Haldane ; but the universality of the error soon gave occasion to another act being made a few months after the decision, which dispenses with the former statutes, and enacts, ‘ That all resignations made in the superior’s hands be quhatsumever vassal, tenant, or uther person, *ad perpetuam remanentiam*, sen the dait of the said act, to be sufficient and vailzeable in the selfe, notwithstanding the said act, swa that the samin may be verified and provin to have been maid by instruments, or uther authentic writings, or sufficient probation, that wald have maid faith and sufficient and lauchful verification thereof, be the usc and consuetude of this realme, observed and keiped in sic like case anent the making of resignations *ad perpetuam remanentiam*, before the making of the said act.’

At this time, it appears to have been sufficient that the act of resignation should be proved by instruments, ‘ or other authentic writings.’ The instrument, therefore, before the date of these acts, was not of importance ; but, since that time, it has been held to be absolutely essential. The new forms made requisite by this act, we mean the procuratory and instrument, had both been previously adopted from the practice of the church. Benefices were by the holder or titular resigned in the hands of the superior, by procurators for that purpose appointed ; but the writ constituting them be-
hoved

The ceremony here is short and simple. Anciently, the vassal accompanied the delivery of the baston, with the words we read from Craig. Afterwards, the delivery itself was held in practice to import these words.

As faines are more eligible when given by precepts, so the proper method of resigning was settled to be by appointing a procurator for the special purpose, in a written mandate. At first, these were commonly granted separately, under the title of *procuratories of resignation*; but afterwards they were engrossed in the disposition, of which we are immediately to treat. A procuratory *per se*, however, always was, and still is a sufficient and habile method of conveyance; and, in resignations to the superior, they were used with much propriety *.

The

‘ Thomson, his predecessors or authors had, have, or justly might have had, claimed, or
 ‘ pretended thereto, heritably and irredeemably, in the hands of the said Right Ho-
 ‘ nourable Earl his superior, *ad perpetuam remanentiam*, to the effect that the property
 ‘ of the said lands, and others above specified, may return and be consolidated with the
 ‘ superiority of the same, standing in the person of the said noble Earl, in all time
 ‘ coming; and may also be enjoyed by him and his heirs in peace, and the rents and
 ‘ duties thereof to be uplifted and disposed of by him and his forefairs, conform to the
 ‘ said obligation, &c. in all points. Which resignation the said noble Earl accepted, by
 ‘ receiving the foresaid staff and baston in his hands, to the effect before mentioned:
 ‘ Whereupon, and upon all and sundry the premises, the said noble Earl asked and
 ‘ took instruments in the hands of me N. P. subscribing. These things were so done
 ‘ within the manor place of Hermitage, the third day of December 1706, before these
 ‘ witnesses, James Johnston and Andrew Watt, both menial servants to the said noble
 ‘ Earl. And thereafter the said John Thomson, in testimony of the facts before set
 ‘ forth, subscribed this instrument in presence of the same witnesses, upon the day and
 ‘ date hereof.’

‘ Know all men by these presents, That I William Johnston, heritable proprietor
 ‘ of the lands after specified, in implement, upon my part, of an agreement perfected
 ‘ between Mr Andrew Murray of Dullarie, superior of the said lands, and me, for up-
 ‘ giving thereof in manner underwritten, have constituted and appointed, and by these
 ‘ presents constitute, appoint, and ordain and each one
 ‘ of them, conjunctly and severally, my lawful and undoubted procurators for me, and
 ‘ in my name, and upon my behalf, to compare at any time and place lawful and con-
 ‘ venient,

The style of these mandates demonstrate, that a simple renunciation is considered to be ineffectual, and that the superior's property will not (as Lord Kaimes inclines to think) become unlimited in consequence of a deed in that form. The vassal not only gives power to his procurator to resign and renounce, but, *per verba de presenti*, he resigns and actually renounces. If a renunciation was sufficient, (as Craig with propriety observes), the procuratory would take effect before it was used; and the vassal by this mandate would be denuded, and the superior invested, prior either to his consent or acceptance. 'Itaque (continues he) meo judicio non transfert dominium nisi in manibus domini superioris acceptantis et non recusantis fiat.'

The original fasine of the superior being held upon a resignation *ad remanentiam* to revive, and the right of the vassal to be completely extinguished, the instruments became, of consequence, real transmissions, of equal effect with fasines; yet, at the establishment of the public registers in the year 1617, they happened to be omitted, we suppose from their unfrequency in practice; so that a purchaser might, even after that salutary establishment, have been cut out of his

F f 2

his

venient, in presence of the said Mr Andrew Murray, or of his commissioners empowered to receive resignations; and there, with all condign reverence and humility, to resign and overgive, as I hereby for myself, my heirs and successors, *per verba de presenti*, resign, renounce, surrender, *simpliciter* upgive, and overgive, all and haill, &c. together with all right, &c. in the hands of the said Mr Andrew Murray, or his procurator appointed for that purpose, immediate lawful superior of the said lands and pertinents, *in perpetuam remanentiam*, in order that my right of property, presently in my person, may return to my said superior and his heirs, and be conjoined and consolidated with the superiority of the same, in the person of the said Mr Andrew Murray and his heirs, and be possessed by them in all time coming; to ask and take instruments and documents upon the said resignation, and generally do every act and deed thereanent which I could do if personally present, promising to hold firm and stable whatever my said procurators, or any of them, shall lawfully do in the premisses without revocation; consenting to the registration, &c. for preservation.'

his acquisition by a resignation *ad remanentiam*. This omission being sensibly felt in its consequences, was supplied by an act of Charles II. in the year 1669, which orders them to be registered in the same way as fines, within sixty days, under the pain of nullity *.

So far these resignations are put on a footing with fines; but a defect still remains. A resignation is good if registered within sixty days of its date; but, in case of a fine upon a base inheritance intervening in favour of a third person, posterior in date, but prior in registration, to the other, it remains a doubt which of them ought to be preferred. In the case of fines, that doubt was removed by the act, anno 1693, lately under our consideration. As this act was intended to regulate the preference of all real rights, a resignation *ad remanentiam* is clearly within the purport, though not within the words of the statute, and, we presume, would receive a determination accordingly.

The procuratory of resignation, like precepts of fine and other mandates, fell by the death of the granter, which occasioned much expence, delay, and circuitous actions at law; for so far did the renunciation, *per verba de praesenti*, operate in procuratories for resigning *ad remanentiam*, that it was sufficient to force the heir of the granter to make up titles to his predecessor, and grant another procuratory; and, no doubt, this was the purview of that part of the statute. In the year 1693, these inconveniencies were remedied by a statute, c. 35. 1st Parl. of William and Mary, which declares, that procuratories of resignation, and precepts of fine, shall, in all times coming, continue in full force, as well after as before the death of the granters, or parties to whom they are granted, or both, provided the instruments taken thereupon express the titles of the parties in whose favour they are made, otherwise to be null.

The reason of mandates falling, in general, by the death of the granter, is that they are revocable during their lives, and granted

The form of a disposition by the vassal to his superior, which has long been universally taken in place of a procuratory *ad remanentiam*, *per se*, is as follows *.

* ‘ Know all men by these presents, That I David Blair of Adamtoun, heritable
• proprietor of the lands and others after described, in virtue of a charter thereof grant-
• ed to me and my heirs by Sir Adam Blair of Cabeny, Bart. superior of the said lands,
• and of an investment following upon the said charter, dated
• and registered Considering that the said Sir Adam Blair has
• made instant payment to me of a certain sum in ready money, whereof I hereby grant
• the receipt, as the full and stipulated value of the property of the said lands, of which
• price he and his heirs are hereby discharged for ever ; therefore I the said David
• Blair have hereby sold, alienated, and disposed, and by these presents sell, alienate,
• and dispose to and in favours of the said Sir Adam Blair, my superior, and to his
• heirs and successors whatever, heritably and irredeemably, all and hail, &c. ; together
• with

and the cause inductive of the deed, which, in this case, is an adequate price paid in ready money. It also contains the dispositive words, with the lands or description of the property conveyed, or what the English term *the certainty of the estate*. As the premises in a charter comprehend every thing from the beginning to the *tenendum*, so the premises of a disposition comprehend all the first part of it, from the beginning to the obligation to invest; or, in the instance before us, to the procuratory of resignation; for these point out or describe the method whereby the dispositive is to hold the lands, *i. e.* the *tenenda*.

After the name of the granter, his title to the subject to be disposed of is generally mentioned. When that title is a complete one by charter and sasine, the words *heritable proprietor* sufficiently denote the title; and these words are never used in any other case. In the deed under consideration, (*i. e.* the disposition by the vassal to the superior), the granter not only terms himself *heritable proprietor*, but he specifies his title to the lands, by mentioning the charter from the superior, with the sasine upon it. This is one of the peculiarities of the disposition by the vassal to the superior: It points out the relation of the parties, and affords a proper, and indeed a necessary introduction to the dispositive part.

The next branch is the *cause* inductive of the deed. The precise sum is, in many cases, specified in this place; though, for most part, it is kept in general terms. The reason is, that the purchaser seldom chooses that his title should bear what price he paid. It affords an argument to a buyer, when he comes to sell; and every
body

‘ oblige me and my forefairs to warrant and assure to the said Sir Adam Blair, and his
‘ forefairs, in this manner, viz. the rents, maills, and duties from my own and my au-
‘ thor’s facts and deeds done, or to be done prejudicial thereto, and the writs and titles
‘ at all hands, and against all mortals. Lastly, I am to discharge the burden due to the
‘ public, and the duties to the said Sir Adam Blair himself, as superior, up to the term
‘ of his own entry; he, by acceptance of these presents, being obliged to relieve me
‘ and my forefairs of the same in all time coming. Consenting,’ &c.

and resolves itself into an immense variety of cases. We are only at present to observe, that, as the feudal grants of land were presumed to be gratuitous, the nature of the estate, or the interest intended for the vassal, was of consequence dependent upon the superior, who might give for life, to one or more heirs, or to the heirs of the vassal for ever, at his pleasure: In the old charters, and in those of England, this was the office of the *habendum*. It came to be done in the premises; and in that place it was continued by our disposition, under the title of *the dispositive clause*.

The next clause is the procuratory for resigning *ad remanentiam*. There is no occasion here for any obligation to invest, because the vassal is dealing with the superior, who has the command of that business. All that the former has to do is to grant a procuratory; and the superior, purchaser of the *dominium utile*, is careful to have it executed. The purpose of it is to execute the intendment of the premises, or dispositive clause, which is done by extinguishing, not transmitting, a tenure. We have already considered the style, in talking of the procuratory *per se*.

The preceding clauses being of themselves sufficient to divest the disposer, and revive the full right in the person of the superior, (so far as it is incumbent upon the former), he considers the business as done; and therefore, by the next clause, he binds himself to warrant the lands, so far as regards the *dominium utile* thereof disposed; for that is all that he was concerned in. In analysing the original charter, we mentioned the origin of warrandice; and it will be remembered, that it is distinguished into special and general, and some make it both. The clause in this disposition is general and absolute. The essential words are, 'against all mortals,' or 'against all deadly.' These words are of the highest antiquity, being found in the oldest charters in Britain after the Norman conquest. Without these words, the warrandice would only be constructed according to the rules of law. The above clause is

now

money of both nations was at that time of the same size and fineness, and so continued till about the year 1355, as Mr Ruddiman proves from a precept of Edward III. printed in Rymer's Foedera. The rents of lands were paid in pennies and in maills, which term is retained with us, though totally forgotten in England. The annual sums paid in the Highlands and Borders for the protection of the chiefs of the clans, were well known under the name of *black maill*, where it continued to be exacted till the last rebellion. *Farms* were the rents in kind. 'The rents of the lands of Hickeling (says Spelman) were ten measures of malt, five of wheat meal, eight gammons of bacon, sixteen cheeses, and two fat cows. But because this rent, thus reserved, was for victuals and diet, therefore they (meaning the Saxons) called it *feorm*, which in their language doth so signify; and from hence it cometh, that we at this day call our rents of that nature, and the land also that yieldeth them, *farms* *.' *Duties* meant, and still means, the personal service of the tenants, such as carriages, ploughing, &c. &c.

In some conveyances, this clause is amplified by the addition of *kains*, customs, and casualties. *Kain* is an old Gallic word for the *head*. So Malcolm I. was called Cainmore from the size of his head. Skene says, that 'lands were taken to be held of the church *nomine cani*; that *kain*, in the auld register of the bishopric of Dunkeld, is defined to be a tribute paid by the servant or subject to his master. The Roman poll tax was termed *capitatio*. So (continues Skene) this word *kain* signifies the *head*, or rather tribute or duty, as cane fowls, cane cheese, cane aites, which are paid by the tenant to the master as an duty of the land; specially to kirkmen and prelates, who, in the time of their greatness and supremacy, used an form and style different from others; and the auld form of precepts given in the time of King Robert, yet extant, anent the inbringing of the King's rents, contains *communis cana, reditus, et custuma*.' *Kain fowls*, *kain cheeses*, &c. are styles to be found

* Remains, p. 248.

therefore the distinct method of clearing them in the deed of sale is exceedingly expedient.

The same assignation which makes over the maills and duties, conveys also the whole writs and titles to the property, and all the clauses thereof; the reason for which is, that there may be, and often are, several personal obligations, unexecuted procuratories, and other clauses regarding the property disposed, to which it is necessary that the purchaser should have a direct title in his person, otherwise he cannot execute these procuratories, or have recourse upon the obligants. A disposition to the lands carries the real title, but does not carry the personal rights relating to it, or divest the proprietor of them. Lord Stair carries this idea the length even of warrandice, which, he says, 'is unquestionably personal, and cometh not within the infeftment, being noways cohering to, or carried by the real right; neither doth the disposition or infeftment of the vassal carry to his singular successor the right of the warrandice, unless it be assigned specially or generally, in the assignation to the writs and evidents *.' Mr Erskine observes, that 'this seems not to be founded in law; for the right of recourse upon the warrandice being part of the right of the subject vested in the disponent, ought, as such, to be carried from him who divests himself of all right he can claim to it in favour of the disponent, though it should not be conveyed *per expressum*. Indeed, (continues he), this observation can be of little use in practice; because dispositions, by their uniform style, bear a clause, conveying all the title-deeds of the subject disposed in favour of the disponent †.'

Lord Stair's observation, however, is useful, because it shows us the ideas which prevailed in his time; and, consequently, points out from what source the present practice took its rise. To prevent the absolute warrandice, formerly given, to be weakened, or the lesser warrandice for the maills and duties to be applied to the writin

* Page 231.

† Page 194.

This instrument, duly recorded within sixty days after its date, totally divests the vassal, extinguishes the subaltern right of property, and revives the *plenum dominium* in the person of the superior. It is the superior's doer who has, in this case, the sole direction of the disposition and instrument; and therefore he is to be careful to take the disposition from the vassal to the very same heirs; or, in other words, with the same destination contained in the superior's titles to the superiority, in order that the property may be consistently absorbed in the higher right.

Having now considered the original investiture in all its parts, together with the mode of reconveying or extinguishing the feu by resignation by the vassal into the hands of the superior *ad remanentiam*, we now enter, properly speaking, upon the great class of derivative rights by which the original estate is alienated or transmitted by the vassal to a third party, who is received by the superior as a substitute for his former feudatory. The ceremony necessary to effectuate this purpose is called *resignation in favorem*, which, indeed, is the most ancient and perfect mode of conveyance. There could, at first, be no question about the superior's consent, because the parties were careful to procure it anterior to their own agreement; and hence, in our ancient deeds, we find obligations by superiors to receive the resignations of their vassals, and to invest the person agreed to be received in their place. The form was this: The vassal appeared in presence of the superior; and there, dropping upon his knee, he said, 'My Lord Superior, I surrender in your hands the lands of D. holding of you, in favour of A. B. humbly praying that he may be entered vassal in my place; and, in evidence, I deliver you this baston.' The superior received the symbol, and delivered it to the intended vassal, or his procurator, who required instruments. This was frequently done in the superior's court. The very same form took place in England, with this inconsiderable difference, that the symbol, in place of a baston, is termed *the branch of a tree*. We shall give as an instance

‘ upon the ground itself *.’—‘ We have (says he in another place)
 ‘ daily instances of this improper investiture in the resignations
 ‘ which are made in the hands of the superiors, either in favour of
 ‘ the vassal himself, or of another. This kind of delivery, therefore,
 ‘ being improper transfers, not the land to the receiver, nor gives
 ‘ him a real right therein, although the superior, after that act, may
 ‘ be compelled to give the real possession. From that time only the
 ‘ vassal’s right becomes real. To express the thing in one word,
 ‘ though this improper investiture, in one sense, may be said to constitute the feu, it neither consummates nor completes it. This is
 ‘ effected by the actual delivery alone †.’ This distinction kept in view, lays open the nature of the resignation *in favorem*, and explains all the difficulties that attend it. No more is necessary, than to recollect that it is simply an improper investiture. The delivery of the baston by the former vassal to the superior, puts it only in his the superior’s power to make a new grant. The delivery of the baston, then, to the new vassal may be separated in idea. It is no other than if an ancient superior, at a distance from his land, delivered a spear or sword, or any other symbol, to one of his soldiers, declaring that he thereby invested him in the land. This delivery was a sufficient indication of the *animus*, or intention of the lord to give his land; but it behoved the real and corporal possession to be also given. As this was impossible at a distance from the land itself, the lord instantly gave a precept for that purpose, the execution of which alone completed the right in the person of the vassal, which gives us the reason why a sasine must follow in the person of the vassal in whose favour lands have been resigned *in favorem*.

Now, the vassal who wished to alienate, either appeared in person, as before mentioned, before the superior; or otherwise, as in the common case of sasine, he granted a procuratory or power for that purpose. According to the ancient form, modelled upon the high feudal idea of the estate being substantially in the person of the superior,

* Page 185. *in fine*.

† Page 184.

ged to illustrate every difficult point in feudal business by allusion to the forms and ceremonies of the ecclesiastic benefices. The similitude, indeed, runs exceedingly close. A feu was acquired by charter, by sale, and possession; a benefice in the church by presentation, collation, and institution; and he who got the first possession was preferable in both. The earliest mode of transmitting benefices was by resigning them in the hands of the Pope, dignified prelate, or laic patron, to whom the disposal of it belonged; upon which he presented and collated the person intended to succeed. Thence we had the language of the resignation *ad remanentiam*, and the idea of consolidation; and from the same quarter we had the style of the resignation *in favorem*. The ecclesiastical, like the feudal surrenders, were originally made pure and unconditional. For, though a beneficed person, resigning in his own life, chose or wished a certain successor, he resigned simply, and then prayed the nomination; which the superior might, or might not have granted. Such, too, was the nature of the most ancient resignations in practice among the inhabitants of Gaul. The church patrons, as fond of homage as any race of men, would not suffer their inferior beneficiaries to make surrenders in any other form than in person. It was the distance of place, and the foreign ecclesiastics, that rendered the use of procuratories matters of necessity; and these were termed *procuraciones ad resignandum*. To save the expence of a particular person travelling from one country to another, blanks were left for the name of any person upon the spot of the surrender, to be filled up. It appears, however, that the churchmen took advantage of the simplicity of the style of procuratories of resignation. They betrayed beneficiaries to surrender their offices, under hopes of a return to their friends, and then bestowed the new grant for value received, without the least regard to the will of the resigner. To obviate this breach of trust, titulars (for so the holders of many ecclesiastical offices were termed) were careful to make their resignations conditional, that a new grant should be given to the persons there specially named. The writs thus

James V. * The form of it, it will be observed, is a letter addressed to the King as superior ; and such was the common practice in surrenders both in England and Scotland. Alexander Naper, the resigner, says that he is not compelled by violence or fear, induced by error, or circumvented by fraud, but acts in consequence of his own free and spontaneous will. These declarations will be found to be a part of the fixed style of all resignations and other alienations of property, and indeed of all other writings in which the party comes under any obligation. These, or words of the very same import, were seldom or never omitted for many centuries, either in this Island or on the Continent. They were introduced in the 13th century, when the study of the Roman law became universal, and were intended to take off the objections upon force, fear, or fraud, which that jurisprudence suggested might be made against any deed. These words

* *Excellentissimo et Serenissimo Principi ac Domino nostro metuendissimo, Domino Jacobo quinto magnanimo Dei Gratia Scotorum Regi illustrissimo, suis humilis filius et servitor Alex. Naper de Inglistoun, cum consensu et assensu magistri Johannis Lethami, subdecani Collegiatae Ecclesiae Sancti Trinitatis prope Edinburgh, Johannis Dischington herauldi supremi Domini nostri Regis, et Margaretæ Campbel suorum curatorum, cum omni subjectione et famulatu. Ego dictus Alexander, non vi aut metu ductus, nec errore lapsus, seu dolo circumventus, sed mea mera pura et spontanea voluntate, cum consensu meorum curatorum, honorabiles viros Andream Murray, Johannem Alison, conjunctim et divisim, meos veros, legitimos, indubitatos, et irrevocabiles procuratores facio, constituo, et irrevocabiter per presentes ordino, pro me et nomine meo, ad resignandum, sursum reddendum, pureque simpliciter quiete clamandum, et libere deliberandum, totam et integram meam dimidietatem terrarum de Gargunnock, cum dimidietate manerii et pertinentiis earundem, Jacend. infra Vicecomitatum de Striveling, per exhibitionem fustis et baculi, in manibus vestrae serenissimae Majestatis Domini mei superioris earundem, quam etiam dimidietatem terrarum de Gargunnock, cum dimidietate manerii et pertinentiis earundem, per has meas literas procuratorii et resignationis, in manibus dictae vestrae Serenissimae Majestatis, sursum reddo, et pure et simpliciter resigno, pro infeodatione et sasina earundem, honorabili viro Alexandro Naper de Marchinton haeredibus et assignatis suis, haereditarie dand. et fiand. ratum et gratum, firmum atque stabile, habend. et irrevocabiter habiturum, totum et quicquid, predicti mei procuratores conjunctim et divisim nomine meo in premissis duxerit seu duxerint faciend. sine revocatione aut obstaculo quacunque ; in cujus rei testimonium, &c. 1533.*

language of the times, and dated in the year 1413*. This writing is curious upon many accounts. Lord Feloth declares that he has sold to the Constable of Scotland the lands of Cowie and Durrlys for a sum paid him in his '*mykle myster*,' i. e. in his great necessity. A similar declaration is seldom or never omitted out of old alienations. Fathers, as formerly noticed, were not allowed to dispose of their property without the consent of their children, who were held to have a joint right. The first idea of counteracting this right arose from the necessities of the present possessor. To disappoint the heirs of their possession might be wrong; but, to allow the proprietor

* 'Be it maid knawn till all men, thruch thir present lettres, me William Frazer, Lord of Fylorth, for to have sauld fra me and my airis and mine assignays forever mair, till a noble Lord and mighty William de Hay, Lord of Errol, and Constable of Scotland, his airis and his assignais, all my lands of the barony of Cowy and Durrlys, wid tenand and tenandryis, and service of free tenand, lyand within the scherrifdom of Merenefs, wid the pertinance to me perteignand, for a sosome of sylvir before hand in my mykle mystr to me payit, of the quhilk sosome I hald me well payit and content; and the forenamyt Lord of Errol, his airis, executores, and assignais, I quit claim for ever mair be thir present lettres; for till hald and for till haff all the lands forenamyt, wid the pertinance, to the forenamyt Lord of Errol, his airis and assignais, of our Lord the King, into fre baronyis, withouten ony claim of me or of mine airis to be maid in the forenamyt lands in ony time to cum; into the quhilk landys Dame Elizab. Hamilton, the wife whilum of Sir Alex. Frazer, as joint fyffer. And what tyme that the foresayd Laidy may be trectyt till upgyff the lands till our Lord the King, or till our Lord the Duke, as governoure, till infest Will. Frazer in the sayd landys, he beand in lauchful possession, full resign the sayd landys in the handys of our Lord for till infest the sayd Lord of Errol frely, his heirs or assigneas. And, in case that the forenamyt Lord of Errol disseise, or yhete the sayd Will. Frazer, as God forbide, his command beand unfulfillit, widin fourty days after the resignation of the sayd landys to our Lord, or ellis hir disseise, the forenamyt Will. Frazer oblys him, his airis, and his assignays, to pay to the sayd Lord of Errol, his airis or assignays, a hundreth pond of the usual money of the kyngrike of Scotland, ilk yere, be yere at usual tymes proporcionally. that is to say, at Whtfd. and Martinmas, ay till his command be fully fulfillit in fourme and effect, na remied in lach canon na civil again standand that may be proponyt on the contraire. In the witnefs of the quhilk thing my sele is put to thir present lettres, at Perth, the tend day of the monith of October, in the yere of our Lord a thousand four hundred and threttine.'

dignified clergymen, many of which are to be found among the ancient writings of Great Britain. When the children, or the heirs, came to be considered as having a right in the property possessed by the family, we formerly showed what pains were taken by the clergy, in particular, to prevent the exercise of this right. The principal method, in practice, was to obtain the confirmation of these heirs upon the death of their predecessors. 'They excited (says Sir Henry Spelman) the children and kinsmen, as out of piety, to confirm their fathers and ancestors grants; so that it grew a matter of course for children, as *haeredes proximi*; for kinsmen, as *haeredes remotiores*; and then for the lord himself, as *haeres ultimus*, to confirm the same; and this is the cause why, at the times near the conquest, you shall see so many several persons, by their several deeds, grant and confirm one and the same thing.'—'In early times, (says Mr Maddox), we meet with so many confirmations successively made to one and the same person, or their heirs and successors, of the same lands and possessions, that it looks as if men did not think themselves secure in their possessions against the King, or other great lords who were their feofors, or in whose fees the lands lay, unless they had repeated confirmations from the King, or his heirs or successors, or other great lords, or their heirs. These confirmations, very anciently, seem to have been made either by precept or writ from the King, or other lords, to put the feoffee, or their heirs or successors, into possession, after they had been disseised; or to keep them in their possession undisturbed, or else by charter of express confirmation *.'

Many of the oldest charters in the *Diplomata Scotiae* are of the kind mentioned by Mr Maddox. Sometimes the express consent or confirmation of the heirs is taken during their own life. Thus, in Duncan's charter to the church of Durham, No. 1. of the *Diplomata*, he says, 'Et quoniam volui quod illud donum stabile esset, Sancto Cuthberto, feci quod fratres mei concesserunt.' The char-

been taken advantage of by his own immediate superior; but he was liable for all the same faults and forfeitures which might have been committed by his own superior towards the King. So soon as these were incurred, his lands lay open to an attack from the Crown, in the same manner as if it had still remained with its immediate vassal. This was the situation of all who held of the immediate vassals of the Crown. The danger grew greater and greater, in proportion as the lands descended or were subfeued by one vassal to another. Suppose that Hugh Crawford, after being invested in the lands of Monoch, had granted a new charter of them, to be held of himself; then that vassal became answerable not only for all the evils happening to himself, but also for all the evils that might happen to the two superiors immediately above him, which rendered his right of a very low and uncertain nature. Hence it became a practical maxim in feudal matters, that a number of superiors was one of the most troublesome and dangerous circumstances attending land property; and therefore, that it was the business of every vassal to get rid of these interjected superiors, and to rise as near to the original source of the feu as possible, *i. e.* to the Crown. In early times, this was not to be done. The importance of superiors lay in the number of their vassals; and therefore each man refused to quit with the dependence of those below him. The second rank of vassals, *i. e.* those who held immediately of the Crown vassals, or tenants *in capite*, being frequently men of interest themselves, applied for, and obtained confirmations from the Crown, in the terms we have heard; and the under vassals, to render their situation somewhat more secure, also applied to the overlord of their immediate superiors, for confirmations of their grants. These confirmations were simple ratifications, sometimes separately granted, but, for the most part, written on the back of the subaltern charter or sasine. The only effect of these confirmations was, that they rendered the vassal safe from the total forfeitures of their immediate superiors; and, consequently, the land could not thereafter

mily, and importance. In France, England, and Scotland, they were called *the great vassals*, and said to hold of the King *in capite*; that was, for personal and military services. To hold *in capite*, or in chief, therefore, was an unerring and essential badge of nobility; and the lands were generally given with jurisdiction over the inhabitants upon them. In France, they were termed *siefs nobles*; and, in Scotland and England, the vassals of the Crown were said to hold by *noble tenures*, and their estates were generally erected into baronies. These tenants *in capite* gave out their lands to tenants under them; and therefore, comparatively speaking, the tenures of the second rank were base or low. Such, however, was the pride and the height of jurisdiction exercised by the great nobility, the immediate tenants of the Crown, and so closely did they emulate their Prince, that we find the vassals holding of them are also said to hold *in capite*. As each, too, had his court, to which all his tenants and vassals were bound in regular attendance, it behoved each vassal newly received to be known to all his brethren (or *pares*, as the feudalists say) in the same situation; and therefore a distinction came to be early established between infeudments granted by the immediate tenants of the Crown, and those which were given to a still lower rank, by the vassals holding of them. The first, in respect of the importance of the superior, his nearness to the Crown, and the notoriety of his jurisdiction, got the name of *public infeudments*; while those given out by their vassals were termed *ignoble, base, or private, i. e.* they were held of low superiors, who had no pretence to nobility, and who had no courts or jurisdiction whereby their vassals or feudal grants were, or could be, known to the public. This distinction of infeudments into *noble* and *base, public* and *private*, runs through the whole system of our heritable rights; and, without a perfect knowledge of them, both our forms and laws respecting property must be unintelligible.

This practice, of every vassal subfeuing lands to be held of himself, was the chief method in which the commerce of land, notwithstanding

kingdoms settled by practice at one half of the land, as above mentioned. Sir John Dalrymple, in his feudal property, has committed a mistake, when he tells us, 'That the act of King William was 'transplanted into Scotland from the Magna Charta.' He thought it so impossible that Scotland could lend any thing to the South, that he was not at the pains to reflect, that our William the Lion ascended the throne anno 1165, and died in the 1214; whereas the Magna Charta of Henry III. was not granted till the 1225, eleven years after the death of our King William. These laws, however, whatever strength the Scottish one afterwards attained, seem at first to have been ineffectual to remedy the practice complained of. The method of subfeuing, under various pretences, went on in both nations. 'Minute estates (as Judge Blackstone observes) were carved out to be held of the granters, and were so proceeding downwards *in infinitum*, till the superior lords observed, that, by this 'method of subinfeudation, they lost all their feudal profits, which 'fell into the hands of the mean or middle lords, who were the immediate superiors of the terre tenant, or him who occupied the 'land *.' In order to do justice to both parties, viz. to the terre tenants of the under vassals, who were thus endeavouring to establish to themselves an independent power of alienation, on the one hand, and to the capital lords or great tenants thus suffering a diminution of their ancient rights, a statute was made in England in the reign of Edward I. anno 1300, which takes its title from the initial words, 'Qua emptores terrarum.' It is unnecessary to give the tenor of this English act, because it was afterwards transplanted into Scotland verbatim, by statute of our Robert Bruce, about the year 1325. It may here be observed in passing, that such a perfect coincidence reigned in the laws and practice of the two kingdoms at that period, that we have just had an instance of a Scottish act borrowed by the English; and we have here another act, upon the same subject, borrowed in return by the Scots from them.

This

* Vol. 2. p. 91.

strengthened their own interest, and refused to comply with the other, which favoured the vassal. Thus the very law which gives complete relief to the body of the people in England, rendered the condition of the same rank in Scotland worse than ever.

So completely was the act of Robert I. neglected by superiors, that, in the reign of Robert III. in the year 1400, an act passed, declaring, that 'if the tenant alienated his land without licence of the overlord, in that case the overlord might recognise them.' Robert III. was a weak and unfortunate Prince: His nobility got the ascendance, and trampled both upon him and upon the people. After this period it was, that the aristocracy continued to gain strength. At last, our connection with the French became very close, and our lawyers and courts had recourse to the written feudal law upon every occasion. They adopted its rigours, and the subtleties of its commentators, whose inferences always tended to increase the power, and swell the pride of the haughty nobility and great Crown vassals. The remainder of the nation tamely submitted to the oppressions of a law which they were told had become universal, and by which their allies the French, in particular, were governed. Hence it was, that the terrible forfeiture of recognition was by our Judges extended, in place of being restrained, over subfeus, rights of annualrent, wadsets, though redeemable, and apprisings, though involuntary. In this situation of restraint, purchasers of land continued to take precepts for infeftment from the sellers, to be holden of their superiors in the same manner as they held it themselves. But, as the act of Robert III. had been totally forgotten, which directed all sales to be in that form, an infeftment taken upon such a precept was of no immediate effect, until expressly confirmed by the superior. Where a bargain had been made with him, or his consent previously obtained, it was a very expeditious mode of completing the title; it needed no more than to take infeftment upon the vassal's precept, and then to take a simple charter of confirmation of it by the superior. It will be observed, that the effect of this confirmation

till *saſine* be taken upon the precept; and therefore the ſuperior has a title to demand all the incidents *medio tempore* becoming due.

If the ſeller of land anterior to the act 1693, for continuing the effect of reſignation and precepts of *saſine*, died before executing his procuratory, *i. e.* before reſignation was made and accepted by the ſuperior, the procuratory fell as a perſonal mandate, and could ſerve no future purpoſe. The only thing in the power of the ſeller to ſupply the want of his procuratory, was to raiſe an action againſt the heir of the ſeller of the land, the granter of the diſpoſition containing the fallen procuratory, concluding that he ſhould be obliged to complete his titles to his predeceſſor, and to grant another procuratory, in the ſame terms as the former, for reſigning the lands. Hence it is evident, that the mode of entry by reſignation was extremely uncertain; for, if the ſuperior was refractory, or not in a capacity to receive it, the warrant run the chance of becoming uſeleſs by the death of the laſt vaſſal. This inconvenience was avoided by taking infeſtment upon the precept *a me*; for it was capable of being confirmed at any time, when the ſuperior's conſent ſhould be obtained, or ſo ſoon as he was empowered to accept of it.

Thus there were inconveniencies and advantages attending both the modes of entering with the ſuperior; either by the execution of the procuratory of reſignation, in order to procure a charter and *saſine*, or by the infeſtment *a me*, in order to procure a confirmation. The effect of either of theſe, when completed, was the ſame, that is, a ſubſtitution of the new vaſſal in the place of the former one, and an extinction of the feudal connection which had ſubſiſted between them.

Now, it is particularly to be obſerved, that the real right of the vaſſal in this ſituation depended entirely upon the ſuperior, and the circumſtances he ſtood in; ſo that, in the minority, the abſence, the feudal delinquency, or the neglect of the ſuperior to complete his own titles, it was impoſſible for the vaſſal or purchaſer to obtain an immediate real right to his eſtate. This was a capital defect; and, while:

Before the establishment of registers, the preference of land rights stood upon the general rule, *prior in tempore, potior in jure*. The first sasine excluded all subsequent ones, if that sasine proceeded upon a right complete in itself, viz. on resignation, upon a precept *a me*, if confirmed by the superior; or, if it was base, a base infeftment was always held to be perfect, so far as it went. We mean, that it carried the property held of the granter, and therefore was, in all cases, preferable to an infeftment *a me*, not confirmed; for, until confirmation, that right was null in competition with any other. The only inconvenience of the subaltern right lay in interjecting or creating new superiors; for every base infeftment behoved to interject a new one. The property, however, still continued to be carried; and, as these base infeftments were capable of being expedited in privacy between parties in understanding or compact, they held out a tempting opportunity for the commission of fraud. A base infeftment could be executed without delay; but a higher one could not; for superiors were to be treated with, and bargains struck, before they consented either to accept resignation, or to confirm.

This advantage was not overlooked by the proprietors of land, as appears from the act, c. 105. 1540.*. By putting the bairns, or other friends, in *state*, or *private state*, is meant giving them infeftment *de se*, holding of the granter, or infefting them base. These attempts, it is declared, should thenceforth be defeated by onerous purchasers attaining peaceable possession, and retaining it for year and day, though their rights were posterior in date to the private ones; a presumption being thence created, that the base rights were fraudulent, or, according to the common phrase, *simulate*. The infeftments which the statute opposes to the private or base ones, are such as had been taken upon resignation or confirmation, that is, open, known, or public infeftments. At first, these epithets were confined to the vassals holding of the Crown, whose immediate tenants were said to hold publicly; and, where such tenants made subinfeudations to be holden

* Vide the act.

consequence, however, did not take place. The reason given by Lord Stair is, that the act 1617 was not at first universally attended to; that a considerable time elapsed before it attained its full effect; and, in the mean time, creditors and purchasers relied upon the established differences of public and private rights. One alteration, however, immediately followed that statute. In place of the natural possession formerly required to the completion of base infeftments, the judges sustained civil possession, or an action to obtain it; and discharges to the tenants were held sufficient, though any date might be given them. ‘By these ways of validating base infeftments, (says Lord Stair), that they might not be excluded by posterior public infeftments, before the base ones obtained possession, or action for possession; the rights of lands of the greatest import became very uncertain and liable to probation by witnesses; and thereby many tedious and expensive processes arose *.’

Since every known mode of alienation had its peculiar advantages and defects, the doers for purchasers availed themselves of all of them, *i. e.* they executed the business in such a manner as to vest every power in the persons of the acquirers, and secured them in retention of the price, till one or more of these powers had taken full effect.

In England, land property can only be transmitted by contract or indenture, not by deed, poll, or single writ. In France, the same rule took place. The transmission of land was, and still is, executed by contracts of infeodation. And, with us, all lands were sold by indenture or contract, signed by both parties. The seller, on his part, declared the cause of the sale, and expressed the price paid, or to be paid. He then sold and alienated the property, and bound himself, for that end, to execute two distinct charters, containing different tenures; one of them, by which the land was to be held *de se*, that is, of the seller himself, for payment of a trifling piece of money, in name of blench duty, if asked allenary. By the other, the

same. By these the purchaser became empowered to enter either by resignation or confirmation, or to hold base, as he might find it convenient. These charters were taken separately, because they were judged to be incongruous. The same fee could not be held of different superiors; and therefore one charter could not contain such opposite warrants. Nay, it was thought for some time, that one person could not take different investments upon the same lands; at least, that the last imported a renunciation of all the former ones; but the Court determined, that the proprietor might use them at his pleasure, independent of each other. So the moment one was set aside, the other might be set up in defence.

The first and most expeditious step, was to take investment upon the precept, in the charter *de me*. This so far denuded the granter of the *dominium utile*, but did not secure the purchaser against posterior public rights. He therefore hastened to enter into the natural possession, or brought an action of maills and duties against the tenants, which completely vested the property in him. But still the holding was base; the property had still two superiors; and therefore, to get clear of the interjected one, the purchaser next took investment upon the precept in the charter *a me*. A confirmation by the prime superior, of a base right, did not render it public; it only secured the vassal, confirmed him against the delinquencies of the immediate or interjected superior; and this continued to be the case even after the establishment of the registers. The investment upon the charter *a me* did not complete, or, in other words, it did not divest the seller of the immediate superiority he had obtained by the execution of the precept *de me*. The investment *a me* was, however, a step; it gave a beginning, but no more; the right continued pendent till the superior was pleased to confirm it; and, from that moment, the intermediate superiority vanished, and the right became public. By this it is meant, that the base investment became void; because, as already observed, the same fee could not be held of two different

place from the date of the *fasine*. It is very different with a *fasine* upon a charter *a me* ; for there the vassal acts alone ; and, till confirmation, the right remains incomplete. A base infeftment, though posterior, would have been preferred to it ; because that infeftment, with possession, was complete *in suo genere*. Nothing, then, was left to the infeftment *a me* but the superiority of the base holding ; nor did it acquire even that till confirmed ; and therefore a second charter *a me*, first confirmed, would have cut it out even of the superiority. The *fasine* upon the disponer's own precept, followed by possession, natural or civil, secured the principal point, viz. the *dominium utile*. *Sasine* upon the other precept, to be held of the superior, was a step capable of completion at any time ; and nothing, in the mean time, could be gained by the seller in committing the fraud of granting double rights ; for a second right first confirmed could only gain the superiority of the base holding, which was of little value, and therefore no object for fraud. Lastly, the procuratory of resignation might have been used at any time during the life of the grantor ; or, in consequence of his decease, another might be had from his representatives.

Three acts of the will were always by lawyers judged requisite to the constitution or transmission of heritable property : 1st, A resolution to dispone ; 2d, An obligation or pactio to dispone ; and, 3dly, A consent that the property may, *de facto*, become the acquirer's. A resolution may rest with the resolver, and has no effect. An obligation or contract transmits nothing, being only a personal right ; and, consequently, it is the disposition or alienation *de præsenti* which does the business. The previous contract between the parties fixed the obligation to dispone. The charters did actually convey ; and the procuratories and precept authorised the delivery. The great difficulty in the transmission of land arose, it will be observed, from the necessity of the superior's consent, and of obtaining those derivative titles necessary to give effect to that consent ; and it will

* Stair, p. 339.

The commerce of land grew by these precautions more common, and superiors came to do with facility what the law could compel them to perform, if unwilling. The security of purchasers increased in proportion as the public registers arose to perfection; and a greater confidence in civil business naturally took place of the more ancient jealousy and apprehension. In consequence of this alteration, the price was either immediately paid, or a separate bond granted for it. The distinct charters and warrants *a me* and *de me* were supplied by an obligation to grant them when wanted. The purchaser had little more to do than to pay the price. All the obligation necessary in the business fell upon the side of the seller; and, for that reason, the old form of the contract or covenant could be of little use. The purchaser had nothing to perform, and therefore the reciprocal obligation or contract went out of practice in common cases, and was succeeded by a single deed, a deed poll, in which the granter speaks by himself from beginning to end. This change, however, took place by degrees. For some time, dispositions were taken *per se*, containing all the terms of the sale, with a precept for infeftment to be held of the granter; and a separate procuratory of resignation was taken, in order to expedite the public holding. Afterwards the separate deeds came to be totally omitted, and parties contented themselves with the disposition alone, when it contained both procuratory and precept.

Thus our disposition, in its present form, grew into practice, and superseded almost every other deed in the transmission of land property. A precept of sasine, or procuratory of resignation, separately, would, no doubt, be sufficient to constitute or transmit heritable rights. But, in regard they did not express the causes of granting, or distinctly specify the holding, the one was judged to be gratuitous, and the other to infer ward-holding. The disposition distinctly supplied both. After the introduction, however, of these deeds, our lawyers talk of them and of charters as synonymous terms. It was mentioned before, and we cannot help repeating it, that our systematic lawyers talk upon this subject in a loose and inaccurate manner.

precept of *fasine* ; one for infeftment *a me*, and the other *de me* ; but it so happened, that dispositions were taken containing obligations to infeft by these distinct manners of holding, but having only one precept annexed, relative to neither, and therefore applicable to both. Lawyers were of opinion, that the disponent infeft upon this precept might ascribe his *fasine* either to the public or private holding, as he pleased. The practice went on ; and, when the point came to be tried *, the Lords found, that the *fasine* was applicable to both infeftments *a se* and *de se* ; and that the supervening confirmation perfected the *fasine a se* from its date. But that, if the infeftment had been taken expressly to hold of the author or his successors, it would have been otherwise. Afterwards, an infeftment of the same kind was found to continue base till confirmation, and that then it became public ; so could not afterwards be made use of, or considered as depending upon the granter or author ; and he, from the date of the confirmation of the prime superior, was liberated from the obligation contained in the disposition to infeft the purchaser to hold of himself †. Upon the next occasion, it was again found, that, after confirmation, base rights became thereby public, and could not be continued base by the will of the parties ‡.

This judicial construction of an indefinite infeftment, so favourable to alienations, and to the security of purchasers, established the method in practice, and for some time excluded every other form ; for, as soon as the advantage came to be generally known, all dispositions were made to contain obligations to infeft by double holdings, and precepts of *fasine*, for most part, in double terms, *i. e.* either *a me* or *de me*.

So great was the convenience and advantage of these indefinite infeftments, that superiors were neglected. Purchasers, though they might have been entered, often omitted to do it. They saved the entry money, and thought themselves secure. Besides, at the
period

* 15th July 1680, Bishop of Edinburgh against Viscount Kenmuir.

† Harcarfe, June 1687, Bothwell.

‡ 25th July 1699, Oliphant.

only remedy, in these cases, was to find out the heir of the first disposer, and to sue him upon the obligation contained in his predecessor's disposition, to complete his titles, and to grant a new procuratory of resignation in terms of the former one. If the superior agreed to receive this resignation, and granted a new charter, it raised at once the last vassal over the heads of all the interjected ones, evacuated their base holdings, and constituted him superior to them. The same fee, however, could not be holden of different superiors. The same vassal could not hold base of the last disposer, and, at the same time, hold immediately of the prime superior; and therefore the middle superiorities were thus at once annihilated. This important use of procuratories of resignation, in sweeping away the rubbish of base titles, suggested to the Court the remedy provided by the act 35th Parl. anno 1693, ordaining that procuratories of resignation and precepts of sasine should be sufficient warrants for taking infeftment in favour of the parties, their heirs or assignees, either before, or after the death of the granter and disponees. This act, Lord Stair informs us, was framed and carried in Parliament by the Lords of Session for the benefit of the public, and proved a very great improvement in the commerce of land property. The expence and delay of forcing the heirs of disponees to grant new procuratories or precepts, in place of those which had fallen by their death, was superseded. Infeftments might be taken upon precepts of sasine at any time; and the errors committed in the intervening titles might be at once rectified by executing the procuratories of resignation contained in the first disposition. X

The same Parliament made another improvement. They declared all sasines of land property preferable according to the date and priority of registrations, 'without respect to the distinction of base and public infeftments, or of being clad with possession, or not clad with possession, in all time thereafter *.' This act most properly destroyed the old and uncertain distinction of public and private infeftment,

* Chap. 13. anno 1693.

X This doctrine is given by Lord Stair in the Appendix to his Institute, but the same it has been much questioned. Mr. R. Bell. Lubner asked the 2^d Justice Clerk Macrae his opinion on the point. His reply was clear the

tainly does give, a more solid rule of preference than could be by any other method ; and thus the whole ideas of our ancient fine were changed, though the language of it yet remains unaltered in our styles.

The next deed to be analysed is just the reverse of the former, a disposition by the superior to the vassal *. The part of this deed will be easily explained.

* I Sir Andrew Fletcher of Aberlady, Bart. superior of the lands and other perty after described, having received the sum of five hundred pounds Scots of John Young of Lery, as the price agreed on between us, for the lands hereinafter disposed, whereof he is hereby discharged, have sold, alienated, and disposed, by these presents, sell, alienate, and dispoise, to and in favour of the said John Young and his heirs-male, whom failing, to his heirs and successors whatsoever, all and sundry (describe the lands) in the fee and property whereof the said John Young and his heirs stand presently vested and seised, holding the same in feu of me and my heirs as their immediate lawful superiors thereof, conform to the charter and titles of the same flowing from me and my predecessors ; together with all right, title, in claim of right, property, or possession, petitory or possessory, which I, my predecessors or authors, had, have, or can in any shape claim or pretend to the said lands or any part thereof, in time coming. In the which lands and others before disposed bind and oblige myself and my forefathers to invest and seise the said John Young and his forefathers by a single investment alienably, to be holden of my immediate superior of the said lands, by the same tenure, and for payment of the same feu and as freely, in all respects, as I or my forefathers held, or might henceforth have, the same ourselves, and to grant and subscribe all deeds or writings that may be requisite for that purpose. And, in order that the said investment may without delay be expedited, I hereby constitute and appoint my lawful and vocable procurators ; committing to them full power and commission to resign and render, as I hereby, for me and my forefathers, resign, surrender, upgive, overgive, deliver, all and haill, &c. in the hands of my immediate lawful superiors of the lands, or in the hands of their commissioners having power to receive resignations on their behalf, and to grant new investments thereupon, and that in favour and for the investment of the same, to be made, given, and granted to the said John Young and his forefathers, heritably and irredeemably, to require acts and instruments upon the premises, and, in general, to do every thing requisite and necessary, or which power of procuratory belongs ; all which I engage to ratify and confirm : V

lasting deeds, yet disponers in the obligation to infeft are always taken bound, in the old form, to grant all other deeds and writings which may be requisite for attaining the purposes of this obligation. This can do no harm in any case, and is often necessary even in our modern securities. The obligation to infeft in dispositions, by expressing the nature of the holdings, answers to the tenenda of the charter; and, in this case, relation is properly made to the duties and services payable to the superior of whom the disponee is henceforth to hold. The clause of warrandice is limited to the subject disposed, *i. e.* the superiority or *dominium directum*, which is evidently proper; so the warrandice by the vassal to the superior was limited to the *dominium utile*; and, indeed, the deed would import no other warrandice, whether expressed or not. In place of an assignment to the maills and duties, as in the last disposition, this one contains a renunciation and discharge of them. As the vassal is now acquiring the superiority, and consequently the right to the maills and duties formerly paid to the superior, a renunciation or release of them (as the English say) is the proper clause, and not an assignment. These payments are to be extinguished, not kept up. The vassal is acquiring a greater estate in the land, and therefore is to be freed of all burden which formerly subsisted upon the lesser one. Lastly, the precept of sasine is express, that the lands are to be holden not of the granter himself, but of his immediate superiors. It is therefore a precept singly *a me*.

There are no terms used in this deed which have not already been explained, except the words 'Claim of right, property, or possession, petitory or possessory.' The general clause always added to the description of lands, of 'All right, title, and interest,' are the words of the ancient release or renunciation still kept up. They are intended to divest the disponent of all collateral titles, by debt or otherwise, subsisting in his person, besides the direct and obvious right upon which he disposes. A *petitory right* is a title to demand something to be done or suffered by another party. It proceeds up

ty, it only forms an essential step in it. The ceremony differs nothing from the resignation *ad remanentiam*, only, that in place of retaining the symbols, the superior delivers them to the resignatory, in token of conveying to him the lands resigned in terms of the vassal's deed. The instrument extended, and registered upon a resignation *ad remanentiam*, completely returns the property to the superior; but an instrument *in favorem* is not registered, because it is only a step or necessary part of the process of transmission.

The effect of this resignation *in favorem* behoved soon to come under the discussion of courts of law; and the question was, Whether, by the act itself, the vassal resigning stood divested of the property or not? and consequently, whether the superior, after accepting of the resignation, was or was not obliged to invest the new vassal? The more ancient construction naturally turned upon the original idea of a feu, viz. that the real estate remained in the superior, and that the vassal had no more than the use of it for his services. Accordingly, by the c. 17. of the *Leges Burgorum*, it was provided, 'That if any man purely and simply resigned his lands and tenements in the hands of the bailies, he thereafter had no power to give possession or sasine of that land to others, until he should be lawfully repossessed of them.' And, by a decision of the Lords, 12th December 1562, *Innes against Forbes**, it was found, that 'if any person resigned his lands in the superior's hands for heritable investment, to be given to himself or any other; he is thereby denuded of all heritable right thereof, if he that overgave obtain not of new again investment and sasine thereof.' This was the plain import of the act of resignation; but, in every view, the resignation was conditional; and therefore the acceptance by the superior was held to create a contract or personal obligation upon him to redeliver the lands to the new vassal. It is for that purpose the resignation was made. If, therefore, the superior refused, Craig informs us, that it was in his time an established practice for the resignatory
to

* Balfour, p. 158.

to apply to the Court for letters of horning against the superior, charging him to grant a charter of resignation in terms of the instrument. The method (Sir John Nisbet adds) was to present a petition, and to produce with it the last charter and sasine granted to the vassal in the lands, together with the instrument of resignation; which instrument was held to be sufficient evidence of the superior's acceptance and consent. Accordingly, by the terms of the instrument, the superior not only accepts, in terms of the disponent's resignation, but he instantly redelivers the land, by returning the symbols to the new vassal, conform to a charter to be extended for that purpose; which is just coming under an obligation to infeft, as in a common disposition, and therefore most properly afforded compul-
 sitor by horning. Accordingly, so late as the 22d February 1741, the Lords, upon a summary complaint against the magistrates of Banff, at the instance of Lord Braco, ordered them to infeft his Lordship, as purchaser of a tenement in their burgh, because they had accepted a resignation in his favour. The next difficulty was not so easily settled, viz. the effect of the resignation *quoad* the vassal resigner. Notwithstanding the ancient idea and the decision in the year 1562, Craig asserts, that it never was doubted by our ancestors, 'That if nothing followed upon the resignation, it was considered to be an imperfect and invalid act; consequently, the vassal might resign a second time in favour of another; and he who obtained the first sasine would be preferable to the property *.' He reasons thus: 'When a person disposes any thing for the purpose of its being given to another, if the person for whom it is intended refuses the favour, the property should remain with its former owner. This is an implied condition in resignation; and, if it does not take effect, nothing is done. According to my opinion, therefore, unless the resignatory be invested with the feu, the property remains with the vassal resigning; but the resignatory cannot

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* Page 438.

‘ get the feu without actual resignation, acceptance, and new investiture. All these are therefore to be considered as one act, any point of which remaining imperfect, vitiates the whole.’ In this opinion he was aided by the analogy of church resignations, for such was the rule in them. If the resignatory did not accept or get possession, the benefice remained with the resigner without a new collation. The Judges, however, he tells us, to his great surprise, had found the reverse in the case of a citizen of Perth. They preferred the first resignation to a second one, though twenty years had intervened between them; and so for some time the point was established upon the more ancient primitive ideas.

This rule continued. In the year 1688 it was found, that the first resignation divests the resigner; and, though admitted to be *actus imperfectus*, excludes the first sasine upon the second resignation; because sasine, when taken upon the first, has a retrospect to that resignation. The reasoning of Craig, and the notion better established of the vassal’s interest, altered the rule; and it was decided, that a resignation *in favorem* did not denude the former vassal*.

This was the opinion of Lord Stair †, and all our writers since have continued in it. The additional reason assigned is, that delivery or surrender, unless accompanied with an intention of conveyance, can have no effect; and in resignation there is no *habilis causa transferendi*. The opinion of lawyers alter with the state of society, and too often with the change of men. Few of their notions have had the duration of these we are talking of. Forms, on the contrary, are permanent; and whatever construction lawyers put upon them from time to time, they generally suffer little change in substance, but retain the original matter and style. The form used in resignation, and the instrument made out in evidence of it, were clearly devised upon the supposition that the property, or *dominium utile*, is, *ipso facto*, returned to the superior from whence it originated. As the vassal was infeft by the symbols of earth and stone;
so,

* 14th November 1677, Purves against Strachan.

† Page 404.

As the feu was constituted in the person of the first vassal by actual possession, or charter and sasine; so charter and sasine are also requisite to constitute it *de novo* in the second vassal. When the form of a resignation, therefore, is attended to, it tells us in the plainest language, that the disponer, or former vassal, is denuded by the resignation; that the fee is, *ipso facto*, returned to, and vested in the superior, who is only personally bound to grant a charter and sasine to the resignatory; consequently, that the new vassal does not hold the right from the old one, but by a new grant from the real feudal proprietor, the superior.

But, as the law constructs it, we are to view the resignation as a mere solemnity which resigns nothing; and that, notwithstanding the resignation, the property, from the date of the resignation to the infeftment upon the charter, remains in the resigner; and that therefore a second resignation with the first infeftment, or a base right followed by sasine, or any other debt or deed of the resigner upon which infeftment follows, will be preferable. In short, we are to understand, that, whatever appearances may be, the real property remains in the vassal, and not in the superior. The *dominium utile* is every thing, and the *dominium directum* very little; and the practical rule thence resulting is, that property depends entirely upon sasine, and its registration. The sooner, therefore, this is done, so much the better; there alone lies security and peace for our employer. In the case we are considering, expedition is the very life of the business. The disposition of the superiority by the superior to the vassal contains only a precept *a me*; and therefore our client has no right until his infeftment be confirmed, or his procuratory of resignation executed. By the act of James V. anno 1540, it was enacted, 'That, in the matter of resignation, if the overlords received double resignation willingly, they, too, are to be punished as the granters of double rights.' If therefore any purchaser should be cut out by a prior infeftment, granted upon a second resignation, his redress would.

This charter is in the old style, full and verbose. We have therefore preferred it to the shorter modern form, and generally will follow

' Lery, and the heirs-male of his body, whom failing, to his heirs and successors what-
 ' ever, heritably and irredeemably, all and hail. &c. Which lands and others above
 ' described, pertained heritably of before to Sir Andrew Fletcher of Aberlady, Bart.
 ' holden by him of us and our noble predecessors, immediate lawful superiors thereof;
 ' and which, with all right, title, and interest which the said Sir Andrew Fletcher had
 ' or could pretend thereto, were upon the day of last, duly and
 ' lawfully resigned by Andrew Walker writer in Edinburgh, procurator for the said
 ' Sir Andrew Fletcher, for that effect specially constituted by virtue of the procuratory
 ' of resignation after recited, in our hands as immediate lawful superiors thereof, purely
 ' and simply by staff and baston, as use is, in favour and for new infeftment of the
 ' same, to be made and granted to the said John Young and his forefairs, heritably
 ' and irredeemably, in such due and competent form as effects; and that by virtue of,
 ' and conform to the said procuratory of resignation contained in a disposition of the
 ' said lands and others before described, granted by the said Sir Andrew Fletcher in
 ' favour of the said John Young, and the heirs-male of his body, whom failing, to his
 ' heirs and successors whatever, of date the day of as authentic
 ' instruments taken thereon, under the subscription of John Hamilton N. P. at more
 ' length proports; to be holden, and for to hold, all and hail the foresaid lands and
 ' others, with the pertinents, of us, our heirs, and successors, immediate lawful supe-
 ' riors thereof, in fee and heritage for ever, by all the righteous meiths and marches
 ' thereof, old and divided, as the same lie in length and breadth, houses, biggings, &c.
 ' &c. (*here the long clause was engrossed*) with all and sundry other liberties, advantages,
 ' profits, easements, and pertinents thereof, as well not named as named, under and
 ' above ground, pertaining and belonging, or that may anyways justly pertain and be-
 ' long to the said lands and others any manner of way in time coming, freely, quietly,
 ' honourably, well, and in peace, without any revocation, contradiction, or obstacle
 ' whatsoever; Giving therefor, and paying yearly, the said John Young and his fore-
 ' fairs, to us and our noble successors, immediate lawful superiors thereof, one pound
 ' of pepper, at the term of Whitsunday, upon the ground of the said lands, in name
 ' of blench farm, if asked allenary, for all other burden, exaction, question, demand,
 ' or secular service, which may be in any shape exacted or required furth of the fore-
 ' said lands and pertinents; attour we hereby require
 ' and every one of you, conjunctly and severally, our bailies, to the effect after mention-
 ' ed specially constituted, that, upon sight hereof, ye pass to the ground of the foresaid
 ' lands, and there give heritable state and saline, with real, actual, and corporal posses-
 ' sion,

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of the property remaining in the vassal after resignation. The moment the superior receives the staff and baston, our forms presume a temporary consolidation to take place. When he returns the staff and baston to the resignatory, he gives an improper investment, *i. e.* an investment not upon the ground of the lands, and thereby comes under an obligation to dissolve the former union, and, *de facto*, declares them separated, by dispoing to the new vassal. This is, however, no more than a personal promise, like a verbal disposition; and the consolidation remains till the charter and *saſine* completes the separation. It is in relation to the act of redelivery of the symbols, and the conveyance thereby expressed, that the word *confirm* is here used by the superior. He confirms the investiture given by delivery of the baston, in the same manner as the ancient superior confirmed the investment previously given upon the lands.

When the investment followed the charter, then the word *confirm* was properly omitted, and is now disused in original grants; but in all renewed charters it remains the capital word, because it relates to some previous act or deed; and, accordingly, in the charter of resignation, it relates to the superior's conveyance to the new vassal, by delivering him the symbols.

The *quaequidem, modus vacandi*, or recital of the manner how the property, or *dominium utile*, did return to the superior, is peculiar charters by progress, or, as the English term them, *derivative charters*. The grants to churchmen, of benefices from the Roman curia, and inferior offices bestowed by Bishops, specified the *modus vacandi*, or means whereby that benefice had returned, and was at the disposal of his Holiness, or other Prelate. This happened either by the death, crime, or translation, of the former incumbent, and to want the *modus vacandi* vitiated the gift. In imitation of the practice, our churchmen introduced the specification of the *modus vacandi* into the grants of civil rights. Spellman terms it *of the granter*, which is very proper; for the right or interest of the granter in the thing disposed is thereby particularised.

As the disposition and procuratory of the seller is the rule for the dispositive part of the charter of resignation, so is the original charter of the feu the rule for these two clauses, and every other circumstance in which the interest of the superior is concerned. 'In the renovation of the feu (says Craig) this is principally to be attended to, that if any doubt or difficulty arises, recourse must be had to the original; for all the conditions and qualities of the first investitures are presumed to be repeated in these that follow; all such being held to be given, if not in the same words, yet of the same nature and meaning; contrary to the general rule, that the last will of a party is declaratory of the first. This is so much the case, that if the renewed charter differs from the original in any article or head, that difference is presumed to have been inserted by error or subreption; and in all cases the terms of the first investiture must remain, unless a special agreement shall appear between the superior and vassal.' Where, therefore, the original titles are not at hand, neither the *tenenda* nor *reddendo* are made special; but reference is therein had to the original charter, and other prior rights of the property.

The rule just mentioned militates equally in favour of the vassals, who are not obliged to admit of any condition, addition, or specialty, in charters by progress, which are not authorised by the first constitution of the right. Upon these principles, in a case mentioned by Stair, where a superior had given a charter of feu with irritancies, and other clauses not mentioned in the contract of alienation, the Lords found, that the superior was obliged to grant another charter, conform to it, in favour of the disponent, although the first vassal had been ten years in possession upon the first charter; but, indeed, this circumstance was taken off by the ignorance and simplicity of the party.

Charters of progress are often granted by the superiors, in course, without reflection upon their own circumstances, or the circumstances of others concerned; and, therefore, the superior, (as Craig observes)

serves) acts gratuitously, and, in effect, gives his assistance in the alienation. The charter, therefore, not only contains no warrantice, but, that no harm may be done, it always contains a saving clause, 'saving always the right of the granter, and of all others.' As they are necessary to complete the title of purchasers, it would be improper to allow the superiors to delay the business, upon pretence of rights in their own persons, or other objections; and, therefore, the Court always decern them to grant the charter in the mean time, even although their own claim may have been rendered litigious, by reduction or declarator. Because, whatever title they may have, or whatever may be decreed in the event of their suits, these are always reserved by a *salvo jure cujuslibet et sui*; a clause borrowed from the cautious deeds of the churchmen. A fine taken upon the charter, and duly registered, vests the subject disposed, whatever it is, in the purchaser.

The case we have been speaking of is particular; it is that of a vassal acquiring the superiority; and this superiority does not make the vassal ascend to the Crown; he still holds of a superior. Sir Andrew Fletcher held the lands of the Duke of Lauderdale; Sir Andrew granted them to John Young in feu; and this John Young purchased the superiority of Sir Andrew, so as to hold directly of the Duke of Lauderdale. Now, observe how this descended. The prime superiority is in the King. The Duke of Lauderdale held only the *dominium utile* of him; but, when he sold to Sir Andrew Fletcher, to be held of himself, then, *quoad* Sir Andrew, the *dominium directum* was in the Duke, and the *utile* in Sir Andrew. Next, by Sir Andrew's feu to John Young, the superiority was in Sir Andrew, and the property in John Young: But, by the resignation explained, John Young becomes his own superior in place of Sir Andrew, and held, as he did, of the Duke of Lauderdale.

When the vassal sold the property to the superior, a resignation *ad remanentiam* effected a consolidation in his person, and extinguished the subaltern right. In the present case, the superior sells to the

vassal, but the superiority cannot be resigned to the inferior right. The original cannot be absorbed in the derivative. The superiority is the basis of the sub-feu, and must remain immoveable. For this reason, the vassal has purchased the *dominium directum*, and stands infeft in it like a stranger. He is therefore both superior and vassal to himself; but he is so by different purchases, and by separate progresses or titles; and, therefore, the superiority and property will remain in him like two distinct estates. If they contain different destinations of heirs, or if different heirs are entitled to succeed by law, the rights will remain separate, and descend accordingly; and, though their destination be the same, yet a distinct set of titles must be completed in the person of the heir. If, therefore, the proprietor wishes (which is naturally the case) that the lands, both superiority and property, should go to the same series of heirs, and that the inconvenience of different titles, and other disagreeable circumstances, should be avoided, the method is, to have the property consolidated in his person. This can only be done by resignation *ad remanentiam*; and he cannot act in character both of superior and vassal, which, at any rate, are inconsistent. The plain method of obviating this difficulty, would be to convey the *dominium utile* to a confident; who, after being infeft, might resign in his own hands *ad remanentiam*. But conveyancers have devised an easier method. The proprietor, as vassal, grants a procuratory of resignation for resigning the lands in his own hands *ad remanentiam*; and, upon recording the instrument, the consolidation is held to be complete, and the progresses are conjoined. The whole descends to the same heirs; and one set of titles is ever after sufficient.

This deed is introduced with a recital of the two rights proposed to be conjoined; and then follows the cause of granting, which is the necessity or expediency of the consolidation. This is what the lawyers term a *rational cause of granting*; which, in practice, will be found to be the parent of many deeds. This is the first writ in real rights which is prefaced by a narrative of preceding titles; and, as
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the greatest part of modern conveyances are so conceived, we shall add a few observations to what has already been said upon that subject.

The rule of practice, in titles to heritage, is this: Wherever the granter's titles are not perfectly complete, and the deed itself only a step in the progress to completion, a recital of the preceding steps is requisite, at least expedient; because the granter's right of conveying is founded on, or derived from, these previous titles: But, so soon as the progress is completed, and the right to the estate established, the party acts no more upon recitals or narratives, but as heritable proprietor. It is true, that delivery of the deeds narrated would, in law, supply the want of reciting them; and, therefore, these recitals are not essential; but they are also excellent methods of illustrating conveyances, which, in many cases, would be unintelligible without them. It must be confessed, at the same time, that the practice has of late years been much abused, and a number of deeds, in both kingdoms, swelled unnecessarily to enormous bulk, and their essentials buried in clumsy narratives. To apply what has been said to the procuratory under examination: The granter's right to the lands is no doubt completed by the two infeftments in his person, but it remains that these two should be consolidated. Now, the procuratory is only a step in that business, and, therefore, the infeftments, upon which the deed is to act, are previously narrated, whereby the whole is rendered plain and intelligible. The recital, in our modern deeds, is just the *quaequidem* of the charter placed in the grant. Neither of them are legally requisite; but they are in every case very expedient. The principle of this deed is, that the superiority and property are distinct estates, meeting in the person of the vassal by separate or singular titles. That being once completely separated, they can only be united by resignation; and, as the feudal law never supposed the case of a vassal becoming his own superior, the Scottish law has invented the fiction of a man doing by another what he could not do by himself, and practice dictated the form.

Upon

Having thus finished the method of completing the title of the purchaser by resignation, we are now to suppose that he chooses the other mode of confirmation, which is certainly less expensive. No more is to be done than to take investiture upon the precept, to record it, and then to get a charter confirming it from the superior; whereas resignation requires a ceremony, an instrument upon that ceremony, a charter, and a fine. The principles of confirmation, however, seem to be very different from those of resignation. The former acknowledges a real estate to be in the vassal, allows him to act as a principal in the matter of alienation, and reserves only a negative or affirmative voice to the superior. This consent is requisite, but that consent, *per se*, validates the act of the vassal. In the latter, nothing seems to be in his power: He does not act in the alienation, but gives back the right in his person to the superior, in order that he may dispose upon it. The gift and the possession, the charter and the fine, appear to proceed from the superior, in the same manner as if the grant had been from him gratuitous and original *.

This

' To all and sundry to whose knowledge these presents shall come.—Charles Duke
of Lauderdale, &c. has ratified and approved, and, by these presents, ratifies, ap-
proves, and for himself, his heirs and successors, perpetually confirms the right and
disposition made and granted by Sir Andrew Fletcher of Aberlady, to and in favour
of John Young of Lery, of date the whereby the said Sir Andrew
Fletcher sold, alienated, and disposed, to and in favour of the said John Young, and
the

firmation, is to take *fasine* on the precept ; and, in several late decisions, it is objected, that a confirmation was void, as being granted before taking of *fasine*. This was an absurd objection. Where the deed contains double infeftments, it is right to take infeftment first ; but the purpose is very different : It is to secure the purchaser in the property of the lands against all posterior debts or deeds of the granter. Where the precept, as in the present case, is *a me*, there is a kind of impropriety in taking *fasine* upon a disposition that is ineffectual till confirmed. The warrant should regularly be confirmed before it be executed. It has, however, always been the practice to take the *fasine*, and then get all confirmed together ; but this impropriety gave occasion for the clause we are treating of. Craig's account of this matter is in these words : ' *Sunt qui apponunt in confirmatione dispensationem cum fasina jam data, nam neque charta quae ab uno alteri datur, de Domino tenenda, neque quae ex ea sequitur fasina, ullius sunt roboris, nisi confirmatio accedat ; quoniam non rite fecisse videtur, qui ex irrita charta fasinam dat, et utraque necessario confirmanda est, et in hoc capite dispensandum est cum fasina ab eo data, qui dare ex jure non poterat **.'

There is seldom or ever a *tenendum* in charters of confirmation, because it implies the granter to be superior ; and the titles confirmed bear the property to be held of him. The *reddendo* is likewise often omitted, because the purpose of the deed is not a new grant of the feu, but an approbation of the conveyances of it by the last vassal, in order to complete the right of the purchaser. In the present case, therefore, the *reddendo* refers back to the original grants of the property ; and a reservation of all other duties and services therein contained is added. The current rent is also reserved, because a charter of confirmation presumes in law that all duties falling due preceding the date have been paid up.

This charter completes the entry by confirmation, and the progress is,

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possible, in order that, upon the failure of one, he might defend himself by the other. Many people then chose, and yet choose, upon taking a charter of resignation, to have all the other deeds and conveyances made since the last entry with the superior confirmed; upon which occasion, the grant is said to be a charter of resignation and confirmation; and it will be observed, that obligations to invest generally bear, that both modes of investiture may be used, 'the one without prejudice of the other.'

The transactions which have hitherto been under consideration are, A purchase by the superior of the property from his vassal; A purchase by the vassal of the superiority from the superior; and we now go on to the next direct occurrence, which is, A purchase by a stranger from a Crown vassal or a freeholder. The *premises* of this deed need no additional explanation, being precisely the same with the disposition formerly illustrated; but it is necessary to attend to *the obligation to invest*. This, it will be observed, is entirely different from the engagement in the last conveyance we had under our consideration, by the superior to his vassal. The disponent is here bound to invest the disponent by double investitures, and two manners of holding; one of himself, his heirs, and successors, in free blanch, and relieving him of the duties due to the superior; and the other from him, of his immediate lawful superiors, in the same manner as he held the same himself, and that either by resignation or confirmation, or both, the one without prejudice to the other. This is now the universal form of obligations to invest in the common dispositions of land property. We were at pains to explain the reason of it, which it is unnecessary here to repeat. As there is no real intention to create a subaltern right, but only to transmit the property, it is always blanch of the disponent and his heirs; but if, contrary to expectation or practice, the purchaser should choose to hold of the disponent, then, besides the precept of sasine, this clause would oblige him and his heirs to execute proper deeds for that purpose. At any rate, the sasine taken on the precept, considered as base, is complete in itself.

The

The obligation mentions, that it is to be performed at the proper expence of the disponee, which is the general practice. The seller pays for, and delivers the disposition; but he is not further understood to have any concern in the expence of entering the disponee with the superior, or even of infefting him upon the precept, though no doubt it may be otherwise agreed. The ancient legal construction of this clause, however, was, that the disponer was bound in the whole, for which a very early decision is to be found in Balfour: 'Gif any person bind and oblige him to obtain another infeftment of land, he oucht and sould do so upon his own proper expences, except special provision be made in the contrair; 15th July 1557, Laird of Coalston *.'

Dispositions generally contain an exception of the subsisting tacks from the clause of warrandice, with an assignment of these tacks to the purchaser. The clause of warrandice is evidently the proper place for introducing the specialty of the tacks. The disponer has conveyed all right and interest in the subjects, petitory or possessory, and warranted the disposition. Tacks exclude the purchaser from the possession, and tie him down to the receipt of a certain rent: They are acts and deeds of the seller, or his authors, and therefore should be excepted, if not specially, at least generally, from the warrandice, which excludes every idea of concealment or imposition, and proves that the purchaser stood apprised of every necessary circumstance relating to it. Indeed, if tacks are even generally mentioned, the buyer will be presumed to have previously informed himself of their nature and extent. The assignment of these tacks, on the other hand, entitles the purchaser to immediate diligence, in his own name, for the future rents.

The precepts of sasine annexed to dispositions are rather abruptly introduced; which, however, ought always to be the case, in order that they may be applied either to the base or public infeftment, as

P p 2

purchasers

purchasers may incline. Some precepts, by way of being very full and particular, are most improperly made to begin with these, or such like words, 'And for expeding the said infeftment by confirmation.' This preamble constitutes a precept *a me*; and, therefore, until such an infeftment should be confirmed, the disponee would have no real right to the lands, and might be cut out by a base infeftment on a second disposition by the seller. On the contrary, was the precept to be prefaced thus, or in equivalent words, 'Moreover, that the said lands may be held of me, and my heirs, as above mentioned;' in that case, the precept would be specifically base. The disponer would be interjected superior. The confirmation of it by the real superior could have little or no effect; and no title could be made up but by regular resignation, as before mentioned.

Hitherto we have supposed that the superior stood ready to enter the vassal. We formerly heard, that, if he refused, there was no method of compelling him but by the expensive circuit of adjudication obtained against the seller, either in implement of an obligation to infeft, or for a fictitious debt equivalent to the value. When the opinions and the manners of a nation alter, that alteration calls for a change in the law; but changes are always judged to be attended with dangerous, and often with unforeseen consequences. In place of entering upon them at once, they are prefaced by fictions, and indirectly introduced; and, when rendered sufficiently familiar in practice, they are directly established by positive law. Thus it was with the entering of vassals upon singular titles: Superiors, sensible that they could be indirectly compelled to receive new vassals, seldom or ever refused: The Crown refused at no time; and the dues on all sides were reduced to certain rules, anterior to the alteration made by the statute anno 1748. The alteration, in fact, had long before taken place; and that act only smoothed and shortened the road. 'Whereas (says the statute) the methods of procuring entries by singular successors in lands that are held of subject superiors, are tedious and expensive, therefore, it is enacted, that any person duly served and
'retoured



statute, base rights have abated little of their frequency. Had our ancient law, which banished these descending titles from England, been simply revived, our land securities would, by this time, have been clear of much intricacy and confusion, which, from certain concurrent circumstances, seem to be daily upon the increase.

When superiors were, by the old act, anno 1469, laid under the necessity of receiving creditors adjudgers to be their vassals, the law entitled them to the receipt of a year's rent, which was termed *entry money*. They found this new casualty extremely convenient; and vassals were happy to pay it, without the delay and additional expence of adjudging. Though the act, anno 1748, meant to convert into necessity what had been only choice before, it did not strike against the just and established rights of superiors. The long and quiet practice of paying a year's rent for the voluntary admission of purchasers, or singular successors, had rendered that payment a just right of superiority. It arose when the other feudal incidents were upon the decline, and it still continues in full vigor; for the act we are talking of provides, that no superior shall be obliged to give obedience to such a charge, unless the legal fees or casualties be tendered to him.

When a creditor obtained a decree of the supreme court adjudging his debtor's lands to him in payment of his debts, the obliging superiors to comply with that decree, though not at all consonant to feudal forms and ideas, does not absolutely run counter to them: But a horning at the instance of a vassal, charging his superior to accept directly of a humble and reverend resignation, under the penalty of personal imprisonment, overturns the whole system, and throws a strong ridicule upon its surviving forms. Though we have lost sight of the principles, it will require a long period to substitute other forms in the place of the old ones. At the same time, it is evident, that the construction will every day recede farther and farther from the latter. By the act which awards the diligence, the superior is allowed to suspend the charge, and to be heard upon his objections.

sonal diligence can take effect. Lastly, the superior's obstinacy and evasion may thus disappoint a vassal from the completion of his titles long enough. The act does not even say that the dispositive is to have the same remedy as the adjudgers formerly had in these cases; but, from analogy, the same would no doubt be allowed.

When superiors are compelled to enter vassals, they have, in general, some particular reasons for refusal; and therefore, though their charters contain a saving clause, they generally choose that the charters granted should also bear marks of the compulsion; and consequently, no inferences can at any time be drawn from these deeds against the interest of the superior, such as that he thereby ratified, approved, homologated, or gave up any part in which his interest was concerned. The charter granted in obedience to a charge upon this homing bears that circumstance *in gremio*; and sometimes the letters are mentioned in the *quaequidem*.

We have dwelt rather long upon the forms of resignation and confirmation; but these are the key-stones of our business, and, once thoroughly understood, will render the practice of conveying easy and safe. We shall dismiss them with a practical caution to the doers for superiors, that, before they deliver charters of resignation, containing precepts of sasine, to their vassals, they ought either to see infeftment immediately taken, or insist upon an obligation from the purchaser or his doer, that the precept shall, *bona fide*, be executed within a time fixed. The reason is, that the act of Parliament 1693, which continued the force and effect of procuratories of resignation and precepts to heirs and assignees, puts it in the power of the receiver of the charter to assign it to another; and then it may serve three or four purchasers, each of whom otherwise behoved to have entered with the superior. There are other methods practised by some writers to reach the same effect, viz. to make it a condition in the charter, or to exclude assignees in the precept; or otherwise to fill up a particular bailie in the blank. As to the first of these methods, a charter in such terms should never be
accepted

legal import of the procuratories and precepts, it was plainly inconvenient and dangerous, in practice, to delay the execution of them. It behoved infirmity to be taken ; and the moment that was done, the deed remained no longer personal, and became incapable of transference by assignment.

The act 1693, so often referred to, points at the mistake of the common law, 'albeit they be granted *in rem suam*, and wholly in 'favour of the receivers;' and it declares, that the procuratories and precepts shall be sufficient warrants for sale, not only to the parties, but to their heirs, assignees, and successors, having right to them by dispositions and assignments. This statute is a model for neatness and propriety of expression; it contains not an idle word; and in efficacy it proved no less excellent: Dispositions from that time, with their procuratories and precepts, have been capable of being retained, transmitted from hand to hand, and completed at any time suiting the convenience of parties: Add to this, the great advantage, formerly mentioned, of retaining procuratories of resignation in full force, so as any distant purchaser, acquiring right by progress, may, by means of one of those, sweep away the intermediate base rights, by acquiring at once the superiority of all of them.

This great improvement, however, has not taken place without some inconvenience; which, indeed, is entirely owing to parties themselves, and not to the law. What we principally mean, is the great neglect of completing dispositions, and suffering them to lie over too long in a personal state; a neglect which has been fatal to the interests of many individuals. Supposing, now, that a man has made a purchase, and received a disposition from the last proprietor, who stood duly infest, and that this disposition contains procuratory and precept, what is the precise right thereby carried to him? This point was minutely examined in treating of the original charter. We have only now to call to remembrance, that such a disposition carries no more than the *jus ad rem*. The words of the disposition indicate not only the consent of the disponent in the strongest terms, but also his
immediate

and *assignees whatever*. In a case, Carnegy against Cranbun, 5th February 1663, it was pled, that, when a disposition or charter happened to be granted to heirs or assignees, not only was the right assignable, but the granter stood obliged to infest one assignee after another; or, at least, that the vassal, upon this clause, might infest any person he pleased without hazard of recognition. It was answered, that the word *assignee*, in dispositions, carried no such meaning: That, before infestment, they might, in consequence of that speciality, be assigned; but infestment once given, the obligation is performed on the part of the granter, who is not thereafter bound to infest, or the superior to receive any other assignee. Therefore Stair tells us, 'That though, in dispositions, lands are sometimes disposed to heirs and assignees, yet assignees use not to be respected in charters.' Even in the case of ward-vassals, this destination to assignees did not save from recognition, if, after infestment, the vassal put any other person in the right of his lands, except the heir apparent. This went beyond the opinion even of Craig, whose feudal ideas were sufficiently strict; but so the Judges determined, not only in the case of Lady Carnegy, above recited, but also so late as January 1696, Lord Carnwath, reported by Fountainhall.

It was next determined, that dispositions and heritable rights were assignable prior to infestment being taken upon them, though granted to the purchaser and his heirs. The general destination is to heirs and successors; and it came to be universally held, that all such rights, while they remain personal, are transmissible by assignation; and that superiors were obliged to receive the assignee of the original acquirer. But, though this point was at last so established, it proved of no great use in practice, because procuratories of resignation, and precepts of sasine, were held by the law in the light of mandates personal, and revocable at pleasure; consequently, upon the death of either the granter or receiver, they fell to the ground, and occasioned a deal of unnecessary trouble and expence, in obliging the heirs of the granter to renew them. Such being the

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all the world know it. But to return: The disposition gives no real right to, or hold of, the property; the property remains in the person of the disponent; he stands infeft; and, by the rule formerly given, a person vested by one *saime* can only be divested by another.

If, then, a purchaser or disponent chooses to convey to another before taking infeftment, it is plain that his deed does not transmit the property, because no man can convey to another what is not in himself: What he does, then, is to put the party in his own place, to transfer his right, such as it is; and particularly the dispositions, or rights, from the person last infeft, with the obligations, procuratories, and precept contained in it. The right being personal, is therefore to be transferred by assignation, which is the proper deed of conveyance in these cases; and by some it is simply so termed, particularly by the author of the Supplement to Spottiswood's Styles. More commonly, however, it goes under the title of *disposition and assignation*. This, we must observe, is justified by the act 1693, which mentions, that parties shall be entitled to take *saime* by procuratories or precepts, who have right to them by general service, or by disposition and assignation. 'A disposition (says Lord Stair) may, and sometimes doth, signify the alienation of any right, whether real or personal; yet these terms are so appropriated, that disposition is applied to the alienation of real rights, and assignation to the alienation of personal rights.'

There are two methods in practice of forming the conveyance. The first is, to recite the disposition to be conveyed, and the price or other induction of the deed; then to dispoise the lands, and rights thereto, in the person of the seller; and next, to assign disposition, and all its clauses, especially the procuratory and precept with the maills and duties of the property. The other method is to dispoise the lands, as in a common case; to give an obligation infeft the disponent; and to assign the rents, with the writs, in real, and the disposition, which makes the grantor's right in p

separate from the special deed of his author. These separate rights, or claims, were formerly more numerous, when the feudal casualties and forfeitures remained in vigor. 'Now, he that disposes a property (says Lord Stair) does tacitly and virtually convey every lesser right, though no mention be made of them, according to the rule in law, *quod majori infest minus*;' and for this same reason disposers add to the special subject the general words, 'all right, title, interest, &c. which they either have, or may thenceforth acquire.' These words, of themselves, are a sufficient general disposition or assignation.

Another rule in law gives the second reason for following this style: 'Jus superveniens auctori accrescit successori;' so that though a disposer be not infest at the time, if he chance to be infest at any after period, that infestment accretes, and by a retroactive virtue renders his deeds equally effectual as if he had been infest at the time: Hence several good consequences, and none bad, follow from the improprieties in style before noticed.

Conveyancers seem to have wished to make as few differences as they could between dispositions upon personal, and those upon real rights, especially in cases where absolute warrandice is taken from the disposers. If, therefore, we are to make a choice between these two forms, it is the circumstance of warrandice which would determine it. Where a person is getting no additional price, or other advantage, by the transaction, but is only serving ministerially to transmit the personal right to another, the deed should bear warrandice from proper fact and deed only, and may be executed in the first form which has more of the assignation than the disposition in it. But, if the case is otherwise, and the purchaser be consequently entitled to absolute warrandice, the second form may be followed, which contains more of the disposition than the assignation. Upon this it is further necessary to observe, that although absolute warrandice, in conveyances to debts, usually import no more than that the debt is just; yet, in conveyances to incomplete real rights, it is the same as if

mon debts are preferable, not according to their dates, but according to the intimation of them. This rule of law is not founded upon the reason of the thing, but upon public expediency ; for there can be no doubt, that the will of proprietors is sufficiently indicated and proved by assignments, and that acts of will alone are what really transfer property of all kinds. But then, to prevent fraud and concealment in the affairs of civil business, which experience showed were capable of being multiplied by secret transmission of property, intimation was made necessary to the completion of assignments of moveable debts ; and therefore a second assignment, with the first intimation, is preferable to the first assignment with the last intimation. It follows, then, that the property remains with the cedent till intimation. In these cases, there is a debtor, to whom intimation may be made ; or there are moveables, whereof possession may be taken ; but, in assignments of personal rights to lands, there is no debtor, and the lands are immoveable. How then is such an assignation to be intimated ? If, in fact, the thing cannot be done, then personal rights to lands are preferable according to their dates ; or, in other words, an assignment to a disposition completely denudes the granter. The first time this question came before the Court, was upon the 20th June 1676, in the case of Brown against Smith ; and the Lords found, that ‘ an assignment to an incomplete real ‘ right had no effect against a singular successor completing his right ‘ by infeftment.’ The Court, however, upon the next occasion, altered their opinion, and found, that an assignment to a personal disposition denuded the disponent to all intents and purposes *.

In a competition between an assignee to a personal disposition, and an adjudger whose right stood completed by infeftment, they found, ‘ That the common author having only a personal right, the ‘ disposition fully denuded him, without necessity of intimation ; so ‘ that the subject could not thereafter be adjudged from him.’ This was a very erroneous decision ; it introduced a rule of preference
in

* January 5. 1699.

in real rights, independent of infeftment, and rendered the transmission of them less ceremonious than common moveables. It destroyed the security arising from the records in one of the most ordinary cases ; for no man would purchase from another possessing upon a personal right, because it was impossible to know whether it had or had not been alienated by another deed of the same kind.

Under this great defect the commerce of land continued till the 21st June 1739, when a competition occurred between Garthshore, an adjudger from, and Bell, an assignee of Chatto, a proprietor, not infeft. The adjudger had obtained himself infeft by charter from the superior, which Bell alledged was void, because Chatto stood divested, by the assignment in his favours, before the date of the adjudication. The adjudger, on the other hand, insisted that the common author's disposition gave him a power of completing it by sasine when he pleased ; and that this power was carried by his adjudication into execution by infeftment from the superior, which had the same effect as if it had proceeded upon Chatto, the common author's resignation, and therefore put an end at once to all intermediate personal rights : That he, the adjudger, being now in the fee, liable to all the casualties, must also be entitled to the rents and profits, the radical right being now transferred into the person of the adjudger by another infeftment ; consequently, though Bell, the assignee of Chatto, was now to complete his title, it could vest nothing in him. This reasoning was solid, both upon feudal principles and expediency ; and the Lords, after mature deliberation, preferred the adjudger.

The old rule therefore revived, and consequently the cedent of a personal right to lands is not completely divested by that assignment ; for he may grant a second one, or his right may be carried from him by adjudication, which is an involuntary or judicial assignment ; and, if infeftment happen to be taken upon either of these second transferences, the first conveyance will be cut out. The general rules now established, therefore, are, that assignments

rights, merely personal, are complete in themselves, *quoad* maills and duties; and, therefore, though the posterior right by infeftment, should ultimately carry the property, it was pled in a case *, that the first disposition should at least carry the maills and duties falling due between its own date, and the infeftment which completed the second one. It was answered, that, if the competition had taken place while both deeds remained personal, the first in date would have been preferred; but it is infeftment alone which determines the property of land; and the rents must follow the subject. The Court decided accordingly.

One circumstance more, and we have done with the account of these personal rights. It is this, that assignees in general neither are, or ought to be, in a better situation than their cedents. It is the cedent's right which they acquire; and, therefore, such rights must transmit under the same burdens and qualifications they were liable to in the person of the cedent: But, in assignments of land rights, this would be inconvenient, and hurtful to the general security of purchasers; and the moment that infeftment follows, the property transfers from the person last infeft to the last acquirer, clear of all debts or deeds of the intermediate holder of personal rights. Suppose, however, an inhibition to be executed against the intermediate assignee upon any of these debts or deeds, then, as that diligence goes upon record, it will afford an action to the user, and, so far as he is concerned, strike against the sale.

The practical rules deducible from these premisses, and which it is our province to observe, are, *imo*, When our employer makes a purchase from a possessor not infeft, and gets possession of the disposition from the proprietor last infeft, no time should be lost in taking infeftment upon the precept of sasine, and putting the sasine upon record. The only exception to this rule is, in the case where the purchaser means immediately to dispose of the property. A transference of the personal right saves the expence of infeftment, and sometime

* Falconer, December 9. 1747.

of an entry with the superior. But, if there is any doubt of the circumstances of the disponer, these expences are not to be regarded. *2do*, If the disponer's titles are not at hand, or to be got, and though we are informed that his title is only personal, the disposition should be drawn in the ordinary form, with procuratory and precept; with an ample conveyance to the writs and titles, particularly to all unexecuted procuratories and precepts contained in them; and infeftment should be taken, *quamprimum*, upon the precept, and the assignment of the mails and duties intimated to the tenants, either by instrument or action. *3tio*, If we find, upon getting the progress into custody, that the disponer's title was only personal, then he ought immediately to be infeft upon the disposition which had been granted in his own favour, which will, *ipso facto*, validate the infeftment taken in favour of our client. *4to*, These will be base infeftments; and therefore, if convenient, a charter of resignation should be got from the superior, containing a confirmation of all the titles executed since the last entry, which will render the progress complete.

To conclude this subject, it only remains to add a simple observation upon infeftments taken by assignees. ^{4th}The act, anno 1693, ordains, that the instruments of resignation, and precepts of saline, taken after the death of the granters of the procuratories or precepts, shall express the titles of those in whose favour they are executed; 'and that the same be deduced therein;' otherways to be null and void. Hence it might be inferred, that, in the lifetime of the granters of these procuratories and precepts, the titles need not be deduced; but, in practice, we observe no difference; although a shorter, or less anxious deduction, would no doubt serve in the first case, rather than in the last, as a neglect would there create a statutory nullity.

Forms of Voluntary Securities upon Land.

THIS subject is the most complicated, and, consequently, the most difficult branch of our municipal laws, both in theory and practice; which is the unavoidable consequence of that universal endeavour which has been exerted to render land property subservient to the wants, the necessities, and diversified circumstances of individuals in society; of splitting, in idea, what is naturally indivisible; and forcing into commerce the most immoveable of things. ‘For this purpose (Lord Kaimes well observes *) a privilege has been bestowed upon land-property, not only of being transferred from hand to hand whole and entire, but of being split into parts, and distributed among many.’—‘Land (continues he) is the great object of commerce; and it is useful, not only by its product, but by affording the highest security that can be given for payment of debt. Thus the property of land is split betwixt the superior and vassal, betwixt the debtor and creditor, and betwixt one having a perpetual, and one having a temporary right.’

We have already considered the division between the superior and vassal, and also how it is transferred whole and entire from one man to another: We are now to inquire in what manner, and by what means, the nicer, and less natural, division has taken place between the debtor and creditor; between one having a perpetual, and another a temporary right.

We

* Tracts, p. 145.

We went formerly very minutely into the history of the interest of money; of the different prohibitions and instructions which have been made against it by the several nations, antient and modern, whose manners have a relation to our own; and we have examined the many subtle distinctions made use of by the European clergy, to evade and get the better of the several regulations against usury which they themselves made. Among the rest, it will be remembered, that a distinction was made in the case of a loan given, which occasioned a *lucrum cessans*, or *damnum emergens*, to the lender; that is, if the lender sold land, or other property which brought him a profit, in order to accommodate the pressing wants of the borrower, the most rigid canonists allowed an interest to be taken, in order to balance the *lucrum cessans*. The church also allowed a person to receive the possession of land, to be kept until his wife's portion should be paid, 'ad sustinenda onera matrimonii.' Fathers who had land, but no ready money, provided their younger children by giving them a portion of it in possession till they should be paid of their patrimony; or, which often happened, when a man in the same circumstances wanted to give a certain sum to the church, without being possessed of the cash, and with an intention to make sale of his land, he followed the same method. These were properly pledges of land; and, because the profit belonged to the possessor, without going to diminish the principal, they were termed *dead pledges*, *mortua vadua*, and *mortgage*. Transactions of this kind were even permitted by the canon law, in some of the cases before noticed; and the express right of accepting of mortgages upon land was granted to churches and abbeys, by the Popes, in the eleventh and twelfth centuries. The same privilege was extended by the customs of particular places to the disposal of the money of minors; and the mortgage became a general and known security for debt. In form, they resembled the Roman *antechresis*; which, with them, was an allowed title to possess land until repayment of a sum lent, without regarding the intermediate produce of the lands,

Since lands themselves might, without doubt, be purchased with money, so any right affecting them, or their produce, might also be bought in the same manner. When, therefore, upon account of the law, and the general prejudice, a man could not directly lend out his money for a stipulated interest, he purchased from the land-holder a rent, or a part of his income, at a certain price. This rent was either the original ground rent, the property of the lord, or it was constituted or charged upon the land by the proprietor. These were attended with different degrees of security, and different in other consequences, which come now to be explained.

The original rent, the property of the lord, in Normandy, was termed *rentes seignoriae*; and in England (upon whom the feudal customs of the former country were imposed) *rent services*; all rents, also, due by soccage, *i. e.* feu holders, or by military tenure, commuted into *escuage* certain. With us, *tax ward* were *rent services*, and might be levied by distressing the tenants, or, as we say, by *poinding the ground*. This privilege, peculiar to real debts, must be properly understood before going further. In the early stages of the feudal law, the right of the vassal was very precarious. It was forfeited upon a variety of faults, of omissions, as well as commissions; many of which, to us, seem slight, but in those days struck with much more force. The lord, upon these occasions, entered upon the premises without ceremony, and ejected his vassal, which did not appear to be a wrong in point of justice, or an impropriety in point of form; because the possession had, perhaps, recently been bestowed by him, and so might the more easily be resumed. Even after feus degenerated by the substitution of money, in place of services, the conditions imposed appear to us extremely severe. ‘Si convenerit (says Craig) ut certus annuus redditus domino solvatur, in quo si peccatum fuerit per annum diem et mensem, dominus sua auctoritate fundum ingredi potest; nam haec conditio neglecta vassallum possessione feudi privat, omnique jure quod in eo habet, et feudum, domino aperit.’

Continued

foncier, or *ground rent*. Hence, too, the English *rent charge*, which was, and still is, a common assurance of annuities.

The very same species of deed was practised of old in Scotland, of which there are a variety of the originals still remaining. Lord Kaimes has published two of them in his Appendix to the Law Tracts, one in the year 1323, and the other in the year 1417. In those deeds, there is no obligation to invest, no alteration of the property, but an acknowledgement of the price, and a consent that the lands of the granter should be distressed, in the same manner as they could be by the proprietor himself. This security entirely vanished out of our practice, and gave place to annuities by investment: These yielded to annualrent rights: Next came the heritable bond: And, last of all, the investment in security. We shall trace the progress and principles of each in their natural order.

‘ It will be a hard task (says Lord Kaimes *) to justify our fore-
 ‘ fathers for deserting the established form of a rent charge, and for
 ‘ substituting in place of it an investment of annualrent; than which
 ‘ nothing, in my apprehension, can be more absurd. For here a man,
 ‘ who hath no other intention but to obtain a real security for his
 ‘ money, is transferred, by a sort of *hocus pocus* trick, into a servant
 ‘ or vassal, either of the debtor or his debtor’s superior. It is im-
 ‘ possible to conceive any form less consistent with the nature and
 ‘ substance of the deed to which it relates, than an investment of an-
 ‘ nualrent. The wonder is, how it ever came to be introduced, in
 ‘ opposition to the more perfect form of a rent charge. I can dis-
 ‘ cover no other cause but one, which hath an arbitrary sway in
 ‘ law, as well as in more trivial matters; and that is, the prevalency
 ‘ of fashion, or opinion. We had long been accustomed to the feu-
 ‘ dal law, and to consider a feudal tenure as the only complete title
 ‘ to land.’

The introduction of the investment of annualrent in place of the rent charge may be thus accounted for: Before the statute *quia emp-
 tores,*

agreed upon between the clergy and the magistrates of Edinburgh, for themselves and the other boroughs, and all others having interest, which were ratified in parliament in September 1551. This is the only occasion in which these different renters are mentioned in our statute law. Skene thus defines the several rights mentioned in this act: ‘*Ground annual* is esteemed to be, when the ground and pro-
 ‘ perty of any land, bigged or unbigged, is disponsed and annailled
 ‘ for an annual to be paid to the annailler thereof, or to one other
 ‘ person, sic as ony chaplain or priest. *Top annual* is ane certain
 ‘ duty givean and disponsed furth of ony bigged tenement or land, of
 ‘ the whilk tenement the property remains with the disponer, and
 ‘ he is only obliged to pay the said annual. *Feu annual* is either
 ‘ when the feu mail or duty is disponsed, as an yearly annual, or
 ‘ when the land or tenement is set in feu farm heritably, for an cer-
 ‘ tain annual to be paid *nomine feudi firmi*.’

The articles agreed and engrossed in the act of Parliament mark a circumstance importing the explanation of these rents not mentioned by Skene. In repairing the tenements, the proprietors are to suffer a reduction in this proportion, viz. the ground annual, one sixth, the top annual, a fifth, and the feu annual, a fourth. This proves that the same tenements were affected by all these at once. The ground annual being radical, is therefore to lose least; the top annual being afterwards charged upon as built property, was to suffer more; and the feu being the price of, or real rent of the whole, being most benefited, was justly to lose most of all. ‘Puto (says
 ‘ Craig) hanc trimembram annui redditus divisionem ab Anglis ut et
 ‘ multa alia in nostros mores et usus irripisse *.’ The division is exactly that of the English; the rent service, the rent feck, and the rent charge; but it did not creep into our customs; it was our original practice, and rather stole out of it; a circumstance which Craig never properly enquired into. ‘That (proceeds he) I may accom-
 ‘ modate their division to our’s, I take the ground annual to be their
 ‘ ren

* Page 82.

It is plain, that both the English and we have had all our divisions of rents from the French. Rent *seigneurial* is, with them, the duties and services due to the chief lord or superior. Rent *foncier* is the rent due to the proprietor. 'There are two ways (say the French lawyers) to create a real rent; one, when the proprietor alienates his land, reserving a rent to himself; the other, when he directly charges the land with a rent.' This is exactly the rent by reservation, and the rent charge by deed. When a second rent is imposed upon land by the vassal, superior to what he himself pays, it is termed *rent arrier foncier*, answering precisely to our subaltern or excremental feu-duties.

Let us now return to our ancient annuity and investiture. It is certain, that, in the earliest periods of the feudal law, incorporeal rights came to be granted as separate feus or estates. Hence Craig's definition of a feu, '*Rei immobilis aut equipollentis concessio**.' The words *aut equipollentis* (says he) are added to include '*Vectigalia, jurisdictiones, annuos proventus, et custodia castrorum, &c. nam et haec inter immobiles enumerantur, et ex iis fructus colligi possunt, licet non sint res sed jura tantum incorporalia.*' The English have accordingly retained the original feudal idea, that every right affecting land, the most extensive and the most limited, is an estate in that land. A fee-simple, a fee-tail, a life-rent, a rent-charge, a lease for life, pass all equally under the denomination of *estate*. All rights in land, corporeal or equipollent to it, were conceived to be distinct estates. Afterwards our lawyers, imbued with the ideas of the Roman law, adopted the distinction of that jurisprudence, and dropped the feudal one.

If we constantly keep in our remembrance the ecclesiastical prejudices with which our predecessors, in conveyancing, during a long period, had to struggle, they will throw light upon every part of their conduct. The purchase of annualrent being considered as the purchase of land, *i. e.* an absolute estate or feu established by the same

* Page 56.

The Romans had, in their practice, two known securities for debt, the *anticbresis* and *hypotheca*, both borrowed from the Greeks, without change even of the title. The *anticbresis* imported an actual cession of the property and the fruits for payment of the interest of a sum borrowed. Both the Greeks, and the Romans after them, distinguished the advantages of real security in place of personal; of trusting to the thing, and not to the man. To render personal security better, it was doubled by demand of cautioners; but many chose, in place of cautioners, to take a pledge of some valuable moveable, the delivery of which rendered the security upon it real. The delivery of an immoveable was conventional, established by either of the methods of *anticbresis* or *hypotheca*. By the first, the creditor was introduced into actual possession; by the other, the borrower, without divesting himself of the possession, obliged or burdened his property with the debt. Hence the maxim, 'Plus cautionis est in re, quam in persona.' Besides these methods, feigned or simulate sales were also known among the Romans for security of debt. The creditor possessed in the character of a purchaser till the debt was paid, and then reinstated the borrower in his right.

The word *wad*, a pledge, is derived by Skene and others from the Saxon *wedd*, and *fett*, an English word, for placing, appointing, or setting apart. Hence it came to signify any temporary right of lands, a lease being by us commonly termed a *fett*. Our ancient law of wadset remains in the 5th chap. of the 3d book of the *Regiam Majestatem*, to which we beg leave to refer. Though this old law discharged the dead wad, it is plain that it had been in practice; and the produce was meant to go in place of the annualrents. The deed, it seems, was silent as to these, and no part of the paction respected them. Pactions were made, in general, in the King's courts; but parties were not allowed to make dead setts, otherwise it would have imported an approbation of the practice. Lands also

were

Stair ; and yet the decisions of our Judges have often proceeded upon the reverse idea. Mr Erskine justly observes, 'That though a
' reversion, adjected to a proper sale of lands, ought not perhaps to
' be stretched beyond the words expressed in it, because it tends to
' weaken or suspend the right of property, which the purchaser has
' acquired for a valuable consideration ; yet in wadsets, where the
' value of the lands seldom fails greatly to exceed the amount of the
' debt for which they stand impignorated, a right of redemption
' ought to receive the most liberal interpretation, because the favour
' lies altogether with the reverser ; and hence the *actio pignoratitia*
' of the Romans for making a pledge effectual, was deemed an *actio*
' *bonae fidei*.' Whatever exceptions the Court judged proper to
make from the general rule, conveyancers adhered to it closer
and closer. In the ancient form of the reversion we are consider-
ing, the time, place, and manner of redeeming are set down with
some anxiety ; but this anxiety increases with years, and reaches
our own times. Our predecessors in profession carefully framed
their deeds to bear the strictest scrutiny of the law at the time. The
judges of the law might relax, except, or soften, as they pleased ;
but conveyancers were right, and ever will be right, never to trust
to interpretation, inference, or opinion, what may be expressly pro-
vided for in their works. This we shall see particularly exemplified
in the case of reversions.

To return to our old wadset. The reversion is followed by a de-
claration, that the produce of the lands is not to be applied to ex-
tinction of the principal sum borrowed ; which illustrates the rules
of the *Regiam Majestatem* formerly alluded to. The law, it seems,
as a check to the deed, had afterwards presumed the produce to be
imputable to such extinction, unless the contrary paction was ex-
pressed, thereby forcing the parties into a plain declaration of their
intention ; but for this another evasion had been contrived. The
produce was not said to be given to answer the interest of the
money, but upon some other separate account. Here it is ' pro
' suis

this kind, the reverser puts himself in a situation disagreeable and dangerous. To supply this palpable inconvenience, a deed was devised, and entitled a *letter of regrefs*. When a loan was negotiated by way of wadset, and the lender refused to hold the lands base, the borrower made a previous agreement with his superior, that he should, in the first place, receive the wadsetter as his immediate vassal; and, upon redemption, that he, the borrower, should be once more received and reinstated in his property. Superiors often found it to be their interest to enter into these agreements, and for that purpose granted them letters of regrefs.

It is unnecessary to go into the old form of the regrefs. We shall first trace the improvements and alterations of wadset rights up to their perfection, and then the style will create very little difficulty.

The very first variation discoverable in the matter of wadsets appears from an act of James II. 1449, c. 19. declaring that tacks of wadset lands, within the real value, should be null after redemption, unless they were nearly adequate to the rent of the property. This was an usurious device to take advantage of debtors, even after their necessities were at an end; and, therefore, the law introduced the exception to the act, securing ordinary tacks against singular successors. It was certainly right to support the one, and to annul the other. Mackenzie tells us, 'that it was supposed to be in desuetude 'till revived in the year 1666;' which accounts for several decisions respecting such tacks, to be found in Balfour, where they seem to have passed without quarrel. When the law was revived, it suffered several modifications, and was allowed to take place only according to circumstances; the general rule being, that such tacks were good, if set for more than one half the real value.

About this time, either from similar necessities, or from the example of our neighbouring kingdom, a method became almost universally prevalent among landholders, of conveying their estates, in trust, to relations, patrons, or friends, in happier circumstances than themselves: The chief reason for which was, to protect their property

The first part of this act throws the injustice upon a different class of men; it makes singular successors suffer in place of reversers. The holders of redeemable rights are left at full liberty to impose upon strangers to any extent they pleased. Mackenzie says, that reversions are, by the act, good against singular successors, provided they be registered. He must certainly allude to posterior acts; for by this one there is no such necessity. The registration is only recommended for the purpose of preservation, not of publication; though it is the first dawning of a record to be met with in our book of statutes.

By means of these reversions, land titles, in Scotland, were made to resemble the English trusts; for a reversion was assignable if it contained assignees; and to render it effectual, no more was necessary than an intimation to the holder of the property; so that heritable estates were thereby made to circulate with ease from hand to hand*. Nay, a man might, by a general assignment, at once divest himself of all reversions in his person; and even this general deed was preferable to posterior special obligations†.

As a reversion might be assigned, so it might have been, with much the same ceremony, renounced; for the estate being already in the person of the wadsetter, subject only to a single condition, a discharge, or renunciation of that condition, rendered the right simple and complete. In this it resembled the ancient release of the English, where the possession of a part made the possessor capable of receiving the whole, by the plain easy form of a release.

Nothing, in these times, created more disputes and disturbances among individuals, in civil business, than the arbitrary powers assumed by all the Princes of Europe, of raising or lowering the value of current coin. In Scotland, it was termed the *crying it up*, or *crying it down*, from the mode of proclamation. Reversions were *stricti juris*, and, therefore, no circumstance afforded so much matter of judicial contention as the differences of money, or so many preferences to wadsetters to defend themselves in the possession. Balfour
quotes

* Vide Balfour, pag. 455.

† Ibid. pag. 448.

property. Notwithstanding, a number of frauds were committed; and the multiplication of them chiefly contributed to the establishment of our register in the year 1617. 'There shall be a public register (says the act), in which all reversions, regresses, bands, and writs, for making of reversion and regresses, assignations thereto, discharges of the same, renunciations of wadsets, and grants of redemption, shall be registered.' Hence it might be inferred, that the business of the nation consisted of trusts and redeemable rights. Land, in short, was the only security upon which the little money in circulation could be raised; moveables made no figure, because trade had not yet shown their value.

By this act, the danger to which singular successors were exposed by the alteration of the form in granting reversions separately, and the act of James III. rendering these separate reversions effectual, was completely removed.

In the acts 1555, and 1617, mention is made of *bands and writs* for making reversions, which are put upon the same footing with deeds of reversion themselves. These bonds arose in this manner: A letter of reversion was a very important deed, and required care in the drawing, and solemnity in the execution; because, as Craig says *, 'Senatui placuit quod reventio sit strictissimi juris.' Now, in the various situations of parties, often far distant from proper assistance, these letters could not be properly or safely executed; especially after the act 1555, which required signing, sealing, and registration. Anterior to that act, people were accustomed to take obligations from one another for granting the reversion, which were afterwards enforced by the Courts, or properly implemented at the sight of sufficient lawyers.

After the year 1617, the distinction must have been lost entirely; because the writing itself behoved to be registered in its original shape; and if, *ex facie*, it was insufficient, singular successors could not be bound by it: However, it continued to be judged more safe, where

* Page 230.

where proper conveyances could not be had, to take a bond than a letter of reversion; because, in the one, the intention of the parties was regarded and executed, while the other could admit of no alteration.

It sometimes happened that reversers became, in the course of business, indebted to their wadsetter in further sums than those specified in the reversion, or borrowed additional sums from them. In these cases, the natural method of security was to burden the reversion with payment of such further debts; and these second deeds were termed *eiks* to the reversion. The title is not chosen with much propriety; for, in place of being an aid to the power of redeeming, as the word would imply, the *eik* is an additional burden upon, or, in fact, a bar to the reversion. These *eiks* to reversions were only used in the case of proper wadsets; that is, where the wadsetters entered into the natural possession, and retained it in place of the annualrents of their money; and, even then, there could not be a place for the *eik*, unless the lands wadsetted were judged to produce more than the annualrents of the sums lent. Sometimes the natural possession of the lands did not suit the creditor, who chose to have the security of a wadset for his money, and to draw the legal interest for it. This gave rise to the improper wadset, which was executed in the following manner: The borrower granted a wadset of his lands to the lender under the common reversion; after which the wadsetter gave a tack, called a *back tack*, to the reverser, containing a rent, or duty, corresponding to the interest of the sum lent. Transactions of this kind were fair and honest; but the avarice of individuals soon converted them into abuse. This fact is strongly proved by statute, chap. 251. of the 15th Parl. of James VI. which describes these tacks to have been granted at large rents for very small sums lent, and annuls them accordingly. The remedies provided by this law, to meet these scandalous practices, might keep them down for a time; and it will soon appear that they did no more. The continued disorders during the long rebellion in the succeeding reigns, brought extraor-

dinary distress upon the country. An act was introduced in the first Parliament after the Restoration, which made a great alteration in the civil business of the nation at that period: It was termed the *act betwixt debtor and creditor*. The situation of the country, the necessity of the interposition of Parliament, and the advantages wrested by creditors from their debtors, in the matter of redeemable rights, are there feelingly described. It then ordains, that all wadsets granted since the 1649 shall be restricted to the ordinary annual-rent; and declaring the wadsetter accountable for the overplus mails and duties, which are to be imputed in satisfaction of the principal sum, *pro tanto*.

In the two acts last mentioned, we for the first time hear of improper wadsets, and a most iniquitous kind of them appears to have taken place. It was usury and oppression, in their native deformity, to take the full produce of lands, which no doubt exceeded the legal interest of the sum lent; to take the chance of the rise of that produce, and yet recur upon the debtor for every loss and accident that could attend property. These might, in particular cases, exceed the original debt, and were most justly reprobated by the Legislature.

In this statute, mention is made of another practice in the matter of wadset, which has not hitherto been noticed; we mean those which are said to be affected with the ordinary provisions and clauses irritant, in case of not payment of the debt at the time limited. The terms of redemption are, by this act, prorogated for five years. These provisions are very ancient in France, in England, and with us. From the rules in the *Regiam Majestatem* we are informed, that, where the wad was given to a day certain, and not then redeemed, it belonged to the creditor. When it was given to no certain day, the creditor might insist in an action before the Judge Ordinary to have it redeemed or sold. The Roman law, as we before noticed, helps our lawyers to a proper term for these hard conditions. They were called *clauses irritant*, and were seldom forgot, where

where the creditor upon land security had an eye to the land itself. Our old law was truly equitable: If the proprietor would not redeem after three offers at three different courts, it was just, and expedient, that the land should be sold; but, even then, the surplus of the price belonged to the debtor. ‘Hoc pactum (says Craig) lege veteri Romanorum pactum legis commissoriae dicitur, et post diem pretio non soluto emptori utrum velit aut vadium retinere, aut pretium repetere optio datur.’ This condition, though reprobated by the later Roman law, as *contra bonos mores*, seems to have appeared in a different light to our Judges; for an act of sederunt, in November 1592, declared, ‘That all clauses and conditions of this kind were to be explained according to the literal express words in which they were conceived.’ Hence all these irritancies, forfeitures, and advantages, were not only declared legal, but, when once agreed to by the parties, they could not be purged by an offer of payment or performance after expiration of the precise day or term mentioned. The irritancy, or forfeiture, behoved, indeed, to be declared by the sentence of a Court; but that afforded little comfort to the debtor, as the misfortune had taken place, and sentence must have passed. Upon those rigorous ideas a case was determined, February 19. 1611; and hence we see the necessity and importance of the act between debtor and creditor, which prolonged the terms of redemption, and saved the distressed part of the nation from being crushed by their fellow subjects.

The equity established by the acts we have noticed, not only gave an effectual disappointment to all the contrivances of avarice which had existed for years, but disposed the money lenders, in general, to submit to the law, and content themselves with legal profit. At the same time, the application of the humane and favourable provisions in these statutes inclined our Judges to view the business of loans with a more favourable eye, and to relax in their ideas about the strictness of reversions, forfeitures, and irritancies; for, from the 1661 downwards, a revolution in our decisions

sions upon these subjects is evidently to be discerned*. To the very same cause we may also impute the change in the form of the wadset, and most other redeemable rights, which about the same period took place, and has ever since continued, where that mode of security happens to be chosen.

In place of the charter and disposition, and the separate letters of reversion, regrefs, &c. lawyers and conveyancers adopted the mode of contract or indenture so much used by the English. The reverser, on the one part, alienates the property in consideration of the sum borrowed; and the wadsetter, on the other part, grants the reversion. Two copies are executed, and each gets one, whereby both are much better secured in their respective just rights.

Having now brought the history of wadsets and reversions to the last stage of their form, it is proper to return to that of annualrent rights, in order to carry them equally forward. We left them in a shape exactly resembling the wadset, *i. e.* a sale of an annualrent out of lands, with a faculty of redemption in favour of the borrower; and the period, in point of time, was at the Reformation of religion. The restrictions and prejudices of the canon law then lost all authority, and the taking of interest for money came to be authorised and regulated by the legislature. The first act made in that behalf was in the year 1587, in the 11th Parliament of James VI.; and, from the tenor of the statute, it appears that annualrent had, long before that time, been publicly stipulated for in the loan of money. According to the ancient rigid prejudices, the lender must have purchased an annuity absolutely, like a piece of land, without the power of calling for his money; and the borrower was often allowed a power of redemption; but now the creditor took care to be equally free upon his part, and therefore added a clause to the deed, importing that the borrower should be obliged to pay back the money at any time, when required so to do, in a certain form agreed upon between the parties. This clause was with propriety termed a
requisition,

* Vide Ersk. Inst. p. 296.

requisition, which brought parties to an equality in every respect. The one might redeem the annualrent with which the lands were burdened, and the other was at liberty to demand his money *ad libitum*. The power of requisition thus given to the creditor, altered the nature of the former right in several particulars. Being thus made expressly relative to a sum or stock in money, it became, from a wadset of rent, or an annuity by investment, an annualrent right. It behoved the old annuities, though granted for borrowed money, to be fixed and certain, like the land itself; whereas now, that annualrent or interest was a matter under the regulation of the legislature, the sum payable by the new right must have varied according to the public standard. An annuity, as part of the land itself, was liable in a proportion of the public burdens; whereas the interest of a loan must have been fully paid out of the rents of the land, without deduction.

Notwithstanding the act 1587, money-holders contrived to load reversions, and clauses of redemption of annualrent, with sums exceeding the legal interest, upon the strength of these clauses being *strictissimi juris*. This principle, it seems, was too hard for the common law, and required a special act to get the better of it; and accordingly a statute was made to that purpose in the 1592. This was the first statutory invasion of the great fort of reversion, we mean, of the strict interpretation which had been invariably annexed to them; and, afterwards, we shall see they lost more respect with less ceremony. The act just mentioned did not meet with the obedience it deserved; and therefore several others followed of much the same import, which, by degrees, brought the iniquitous practice of usury in the form of annualrent, whether of money or victual, under due regulations.

The formal mode at first prescribed by requisition being found by experience to be inconvenient, the form of the annualrent right underwent another change in the reigns of Charles I. and II. The debtor was taken bound by a personal bond to repay the money; and then,

then, for more security, he annexed a right of annualrent by infestment, corresponding to the legal interest of the principal sum lent. At other times, the creditor, in place of annualrent, was infest in the whole lands themselves for security of his debt, principal and interest. These were the forms established and approved, both of wadsets and annualrent rights, at the time when our system of styles was collected and published by Dallas of St Martin. From the personal obligations, added to the real security, these deeds at last got the name of *heritable bonds*, which is a compound of all the progressive securities we have described. The history and theory of these writings being now finished, we shall proceed to examine the forms themselves.

We shall, in the first place, examine the form of the proper wadset from Dallas's Styles *. This contract, which is extremely verbose, is executed by the proprietor of the lands to be wadsetted, and his lady, of the one part, and by a gentleman, lender of the money, and his wife, of the other part. The subject to be wadsetted is a free victual rent out of certain lands, with a manor-place, and pasture for a cow and a horse, all which the wadsetter is to enjoy in lieu of the interest of his money ; and, in security of this, certain other lands are disposed in real warrandice.

1st, We have the *premises*, containing the names of the parties contractors, and the receipt of the price by the borrower. There the old apology is continued by the necessity of the loan, and the advantage to which the money has been applied.

2^d, The *dispositive clause*. It will be observed, that, in fact, it is an annuity of victual which is here wadsetted ; and the method of doing it is to convey the lands themselves, in so far only as might be extended to the said victual rent. The manor-place and pasture are the only parts which the wadsetter was immediately to get possession of.

3^d,

* Page 709.

3d, The *obligement to infest* by double infestments, and to grant all separate deeds for that purpose, according to the old method of making sales, the reasons for which were at length assigned in our treatise upon dispositions.

4th, The *procuratory of resignation*, for infesting the wadsetter *à me* of the superior.

5th, The *obligement of warrandice*, which is here extremely particular, and contains provisos proper to the real security given upon the occasion.

6th, The *exception* of the standing tacks upon the lands from the warrandice. The wadsetter's rent is to be paid out of the 'first, best, and readiest of the maills, farms, profits, and duties of the lands.' These words were not without meaning. The ancient annuity had no relation to any stock or principal of money; it was liable, therefore, to a proportion of the public burdens of the lands, as a part of the land itself. But it was found, that, if the sum or quantity was provided to be paid out of the first, best, and readiest maills and duties, it was a free annuity, liable to no deduction*. These words have accordingly remained in our style.

7th, An *assignment* of the tacks in favour of the wadsetter, and of the maills and duties, to the extent of the twelve chalders wadsetted.

8th, A *declaration* that the assignment of the tacks shall not infer approbation of them, but that all concerned should be free to quarrel them. It was early doubted in our courts, if a singular successor to any tack or contract could quarrel that deed upon any ground, since it had not been done by his authors, especially as the conveyance by the one, and the receiving of them by the other, imported an approbation by both. To avoid the legal inference, and retain every objection through all kinds of transmissions, this clause was devised, and continues in practice. The meaning of the words,

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* which

* Harcarfe, *viz* Liferent.

* *which may not infer warrandice against the granter, and his fore-saids,* is this, the granter may have come under personal obligations which a singular successor could not be bound to implement; and his refusal would bring a personal action against the disponent. These words protect him from the consequence, and burden the right of the singular successor with every thing incumbent upon him the granter; and so it was found in the case of a charter granted with clauses opposite to the nature of the holding*.

9th, *Obligation* upon the one party to deliver actual, real, and peaceable possession of the houses to the wadsetter. These are just the words of the sasine. It was difficult to distinguish the sasine from the real possession, because they were anciently the same. If the possession was not delivered, the wadsetter might take it *brevi manu*, without hazard of ejection or intrusion. These were the remedial actions given by the law against violence, in the matter of possession. Though a man sells, if he does not deliver, the buyer must not seize the thing at his own hand; but must wait till the bargain be concluded by peaceable delivery. Conveyancers, fond of their own works, wished to break through these rules of order: They judged every thing to be done by the execution of their writs, and therefore thought it sufficient to dispense with the law, and to establish disorder by agreement: They contrived the *brevi manu* clause, and dispensed with the legal penalties or consequences; and they did not consider, that it is the law which gives effect to their writings, and will not suffer public order to be destroyed by private conventions. These clauses, therefore, are seldom or never to be trusted to.

10th, *Obligation* upon the reverser to keep the lands in tenantry, and to uphold the rent clear of deduction; for which purpose the benefit of the acts of Parliament is renounced *upon honour*. The acts here alluded to are those which we formerly considered, for preventing the evasions of creditors in the exaction of victual rent, and for

* 9th November 1748, Nafmyth.

for giving relief to the debtors where the possession was taken, and yet all the danger and contingencies of the times thrown upon the reverter. This contract is evidently usurious and oppressive, and is an excellent commentary upon the statutes and the times. The pretence for all these hard conditions is, that the rent is a fixed and free one; but the renunciation of the benefit of the law, and the number of unusual clauses with which the debtor is unmercifully loaded, betray the consciousness of the lender, and prove the situation of the country to have been wretched indeed, when people of property were ready to submit to such hard conditions. The variety, too, and uncertainty of public imposition, mark the distress of the people. There was little or no trade to relieve the landholder; and the only rules of imposition must, of consequence, have been the exigency of the public. The wadset, notwithstanding all the care taken to fix an usurious profit, is truly a proper wadset; and, whatever the virtual rent exceeded, the value would have annually imputed to the extinction of the principal; and so it was afterwards found in several cases, where the form seems to have been borrowed verbatim from St Martin. The reason was plain: The wadsetter is defended from all possibility of loss, and therefore had no title to one farthing above the legal interest; so that these usurious deeds disappointed themselves.

11th, A *proviso*, that, in case any of these burdens should be paid by the wadsetter, the amount should be *eiked* to the reversion. Another severe stipulation to make the former more secure.

12th, An *obligement* to receive the wadsetter and his heir without composition; and an assignment of the whole casualties falling during the subsistence of the wadset. This is a reasonable clause, which accordingly continues in all redeemable rights; and the import of it we shall afterwards have occasion to consider. The next part of the deed respects a private lease, which being particular to the transaction, is not to be noticed.

13th, Here begins the counter part of the agreement, viz. an obligation by the wadsetter to grant a formal and sufficient letter of reversion. The question naturally occurs, Why is not the reversion itself instantly granted? This circumstance strongly marks the caution of our forefathers in conveyancing. We formerly said, that the reversion, in ancient times, was contained in the body of the right. For ages afterwards, however, they were executed in separate deeds. All our acts of Parliament, decisions, and laws, anterior to this, relate to reversions in that shape. The contract was a form but lately adopted; and an obligation to grant reversions was, in every case of the least doubt, in use to be taken in place of reversions themselves; and it was judged safest to follow that method, for the reasons formerly given. This explains the clause providing that the contract shall be equally sufficient for the purpose of redemption, as if a particular letter of reversion had been executed and registered conform to the acts of Parliament. There is, indeed, sufficient reason for its being so, because this obligation is equally special as any reversion possibly could be.

14th, The *clause of requisition*, which is here suspended to a term certain, is the only circumstance introduced in favour of the unfortunate reverser. After this term, he is to be liable to pay back the money upon demand, and is accordingly, by the second part of the clause, taken personally bound to do so. This was even a novel condition in wadsets, introduced about the time of the Reformation, which, by renewing the religious prejudices respecting money-loans, rendered the condition of the borrower, in several circumstances, much harder than before.

This personal obligation is taken 'without prejudice of the real rights and investments,' which, it is provided, are notwithstanding to remain unhurt. The power of requisition and personal obligation upon the reverser, being novel claims, no mention of them are made by Balfour or Craig in the matter of wadsets; because they were not, in their times, considered to belong to these securities. All
rights

rights upon land were executed in the form of an absolute purchase, redeemable by the borrower. The lender, therefore, had no right to call for his money, because that circumstance would have betrayed a loan for usury. Another reason is, that a requisition, anciently, could not have served the present purpose; because execution against the person of the debtor, for payment of a liquid debt, was unknown. By the ancient law of this island, moveables alone were open to attachment: Land succeeded; but it was long, very long, before the person of the debtor came to be subjected. In Scotland, this did not properly take place till the year 1584, when it was introduced by the 139th act of the 8th Parliament of James VI. It was only upon deficiency of moveables that land was suffered to be attached. Even after access was given against the person of the debtor, the moment he was imprisoned the will of the letter of four forms, or horning, was obeyed, and all other execution ceased. The notion of exposing a man's moveables, lands, and person, altogether to execution, for payment of civil debt, had by no means become familiar. So far from it, that, by the act last cited, it is provided, 'that letters of horning, as well as poinding, the one not prejudicial to the other, should be directed:' So that the giving access both to the moveables and person was judged to be a great stretch, requiring an act of Parliament to authorise it. If this was the case, far less could it be admitted that a wadsetter, or annualrenter, in possession, at least, of an equivalent in land for his money, should be allowed to distress the person of the reverser for recovery of his debt. The idea must have appeared to be most unjust and unreasonable.

After the Reformation, when clauses of requisition were imposed by the money holders upon the granters of wadsets, and other rights for security of debt, the law, which alters not at once to serve the interest of any set of men, still continued to establish the principle, that a creditor could not use both his securities at the same time; but that, if he executed the requisition, charged or sued for recovery of the debt, his real right became thereby, *ipso facto*, void, and the legal

gal distinction altered. In place of going to the heir in the shape of a wadset or annualrent right, it went to the executor as a moveable debt. Thus, Stair gives it as a rule *, 'that complete heritable rights themselves, containing personal clauses of requisition, become moveable by requisition or charge, which is, *pro tempore*, a passing from infestment, and taking the debtor for the personal obligation.' And, in another place †, 'wadsets are taken off by premonition or requisition, requiring the sum upon which the wadset is granted; which makes the sum moveable, and the infestment of wadset void.' These rules protected, for a long period, the persons of debtors. Creditors were afraid to attach them; as they knew, that, after they had done so, they had nothing but the person to trust to.

In order, then, to get rid of this principle of the law, and elude its consequences, the writers of these days devised the proviso, that 'personal obligations, and diligence upon them, should not prejudice the real right.' Conveyancers were always ready to avail themselves of the maxim, '*Provisio hominis tollit provisionem legis.*' In the present instance it had not the desired effect; for, notwithstanding the conventional clause, the law remained long in force. Mr Erskine says ‡, 'the doctrine should have been rejected after the introduction of this clause.' A very sufficient reason, however, may be given why this did not follow. Both the legislature, and the courts of justice, had been employed in disappointing the rigorous conventional conditions imposed by creditors upon their debtors. In such humour, it was not probable that they were disposed to pay regard to a stipulation of this nature, which ran counter to the very foundation of the law. We shall afterwards find, that our decisions upon this head took an opposite turn; and they did so, not for the reasons assigned in the law books, but because the ideas of men upon the subject had altered. Execution against the moveables, the land, and the person, became familiar by degrees; and personal execution, even in the

* Page 168.

† Page 349.

‡ Page 175.

the case of heritable rights, began to be judged not inconsistent with real security. Our subject has led us to trace this progress, which we have been at particular pains to open up, because the effects still run through the form of most of our heritable securities; and because our systematic writers, so far as we can find, throw no light upon this point. Mr Erskine, indeed, acknowledges *, that, 'by our former law, requisition used by a creditor upon a wadset, or right of annualrent, made the sum in the right moveable, which before was heritable. This seems (continues he) to have proceeded from the effect then given to requisitions of extinguishing the real security.' But we are left entirely in the dark as to the reason for giving such effect to the requisition.

Thus have we laboured through the prolix form of the proper wadset. It has been tedious no doubt; but we shall afterwards find the real benefit, and think our pains and patience not thrown away.

The next form given by the father of our styles, is the *improper wadset*, which is no more than the former draught, with the addition of a back tack, which keeps the reverser in the possession of his property, and secures the wadsetter in a fixed return for his money. Anterior to the form of the contract, the wadset was executed by a disposition or charter from the borrower, and by a separate reversion from the lender. The contract we have been considering is nothing but a compound of these two deeds; or, rather, it is a junction of them into one. The first part of the contract is almost entirely the deed of the debtor, and consists of the same clauses with a disposition. The other part of the contract is the deed of the creditor, and contains the reversion, with its conditions; so that, in form, the innovation was by no means violent.

The consequences of the improvement, however, were not so inconsiderable. In the first place, it will be remembered, that the act 1617, excepts 'all such reversions as are incorporated in the body of the infeftments, made to the person against whom the said reversions

* Page 175.

‘reversions are used.’ The contract itself, therefore, needs not be recorded, as the *fine* answers all the purposes of the act; because it contains the reversion, and all the other conditions of the bargain.’

For the very same reason, no separate letter of *regrets* is necessary. That the lands are redeemable in terms of the reversion, is an express condition of the contract; and therefore, though the *wadsetter*, in virtue of the obligation to *infeft*, *a me*, enters with the superior, the condition of reversion adheres, and implies an obligation upon the superior to receive the reverser upon redemption, without any bond of *regrets*. This leads us to consider the *infeftment*, which the *wadsetter* takes upon his contract. From the exception in the act, anno 1617, it is clear, that the ancient method of ingrossing reversions, and other conditions in the disposition, or deeds of *wadset*, had come again into practice, and that the conditions thence passed into the *fin*es taken upon the deeds. By this act, all *fin*es were appointed to be recorded; but, if such *fin*es contained the reversions, it was unnecessary to record such reversions a second time. At any rate, singular successors could not be deceived, because the right itself declared its own qualification; and, therefore, our writers all agree, that no registration of the contract, in that case, is necessary. The act, however, uses the word *infeftment*; of which the *fine* may be said to be an essential, or integral part. A disposition, or charter, is not an *infeftment*; it only becomes a part of it when *fine* is taken. Although, therefore, the reversion might be made real, by being incorporated in the deed of *wadset*, they were not published, or made evident, unless they entered the *fin*es, and consequently the record. — This was the principal intention of the record; for, though separately granted, they had been formerly made real by the act of James III. — It is true, that the act 1617 had not principally in view the sale or *wadset* of property, but was directed against the fraudulent transactions of parties, who had sold their lands, and defeated these alienations by private rights. Though parties to such important transactions might
examine

the words of the reversion authorize it. In the history of the wadset we had occasion to explain this matter, and to show that the principle has since been justly doubted by our lawyers. So far has practice receded, that reversions go to heirs, though heirs be not mentioned, which is certainly inconsistent with the notion of their being pure faculties. Mr Erskine's conclusion upon this head seems therefore to be just *, 'that the distinction between rights and faculties, 'so far as concerns this particular, seems to be without a difference.' The Court will probably reverse the rule, and find that reversions are *bonae fidei*. In the mean time, however, our business is to exclude all dispute of the kind, by carefully wording the destination of the reversion, according to the real meaning of parties, under the presumption that our words will be strictly interpreted.

Supposing, then, the reversion to have been taken to heirs and assignees, let us next consider of the mode in which this transmission is to be executed.

If the wadset lands hold of the reverser, the superiority remains in him. If he means, therefore, to convey the reversion, he must do it by disposition and sasine. In that case, the preference of the disponees will be determined by the first infeftment; for it is the lands that are conveyed; and the wadset is excepted from the warrandice, and the right of reversion conveyed with the other titles. No intimation is necessary, as the disponee is infeft upon the disponent's resignation, whereby the latter is fully denuded; and (as Hope says †) 'non remanet penes eum juris aliquod vestigium vel color.' Until intimation, the right is presumed to remain in the cedent; but, in the case in question, the disponent is absolutely divested by the infeftment.

If the wadset lands be held of the reverser's superior, nothing remains in the person of the former but the incorporeal right or faculty of reversion, which is transmissible by assignation alone, and perfected by intimation. 'An assignment to a reversion (says Craig ‡) 'hinders.

* Page 293.

† Page 250.

‡ Page 239.

successors are bound to take notice. By the act, anno 1617, reversions must be registered, otherwise they have no effect but against the granters themselves. From an inaccuracy of expression, however, assignations to reversions were not appointed to be recorded; assignments to bonds, or writs for making reversions, being only mentioned. The Lords, in the year 1636 *, found, that they could not extend this act to the other case, which was shewing a most scrupulous regard to the statute law. Afterwards, in the year 1665 †, they did extend it, in effect, by finding none but registered assignations good against singular successors; but this capital difference still remains, that an assignment to a bond, for making a reversion, will be good for nothing, in a question with third parties, unless it be registered; whereas an assignment to a reversion itself may be made good against any number of individuals by intimation. By the last decision, an assignation, duly registered, is preferable to all eiks, second rights, and other deeds whatever, which are registered posterior, though of date prior to itself.

The next practical supposition is, that the wadsetter chooses to convey his bargain. If he is not infeft upon the contract, then, being only a personal or incomplete right, it is to be conveyed by assignation, or, as it is commonly termed, by *disposition* and *assignation*. This disposition recites the contract, and is exactly modelled upon a conveyance to a disposition without infeftment, which recites the disposition, and then conveys its clauses and powers. This conveys something more, viz. the principal sum or debt secured, together with the clause of requisition for recovery of the debt itself, independent of the real security. An infeftment, therefore, completes the right, in the same manner as it does a conveyance to a simple disposition. In case the wadsetter be infeft, he conveys precisely like any other heritable proprietor, under the special condition of his right. The contract of wadset is first narrated, and there is a necessity for it being done at some length, because it explains.

* Durie No. 599.

† Dec. 5. Begg.

same manner as they would be by a superior to a vassal. Lastly, if the wadsetter stood entered with the superior, the faculty remaining with the reverser may be extinguished by a simple discharge and renunciation, which is a very plain deed, requiring no illustration. The ground right and property is renounced, and all the titles of the estate delivered up, in the same manner as they would be to an absolute disponent. Registration, in terms of the act, anno 1617, completes the business.

We now proceed to the legal methods of forcing either party to evacuate this species of security, viz. by *requisition*, on the one hand, and *redemption*, on the other. If requisition be not made by the wadsetter himself, it must be by a procurator specially appointed for that purpose. A general faculty will not do, because it tends to the extinction or alteration of a real right; and every deed regarding land property requires special powers, from the nature of its importance. The powers given by this deed are also implicitly taken from the terms of the requisition in the wadset, each punctilio of which must be complied with, as requisitions, no less than reversions, are *strictissimi juris*.

In order to make an effectual requisition, the procurator, with the special mandate, and a double of the contract of wadset, or principal reversion, must go to the personal presence of the reverser, his heirs or assignees, or others appearing from the record to be in the right of the reversion. The notary first reads these writings, and then the procurator makes requisition, in the exact terms of the clause*. This being done, an instrument is drawn, reciting the whole procedure in a full and pointed manner, in which the procuratory for making the requisition is specially mentioned to be delivered to the notary, and read by him. This was of old judged so material, that the omission of showing the procuratory annulled the requisition, though it was not asked for, or mentioned by the other party†.

Nay,

* Supplement to Spottiswood, p. 272.

† 13th November 1622.

the lands wadsetted : Furnished with which, and the whole writs delivered to him at receiving the contract, he attends at the time and place appointed, either in person or by his procurator, with the notary and witnesses. If the reverser appears, and refuses payment, or if he does not appear, the other party publishes the original contract, the procuratory, and the instrument of requisition : He then exhibits the grant of redemption prepared, and takes his protest upon the whole. The instrument made out upon this occasion is termed an *instrument of attendance* *. By this instrument the penalty in the obligation of requisition becomes due, for it is then only incurred. The wadsetter is also thereby at liberty to use every kind of diligence for recovery of his money, both against the person and property of the reverser, in the same manner as he might have done upon a decree or common bond.

It was said, that requisition was held to be inconsistent with the heritable security which thereby became void. The reason of this was also assigned, viz. that execution against both the person and estate was not, by our old law, admitted at one time ; and afterwards, when that idea became more familiar, it naturally influenced the point we are talking of. The Court, at first, found that a wadsetter might pass from his requisition, and clothe himself with his infestment, so long as the sum was not paid, consigned, or offered †. ‘ And (says Mr Erskine) our late lawyers, more agreeably to the nature of requisition, are of opinion, that such right continues heritable even after requisition.’—‘ The demand of the money by a creditor in an heritable debt, though made judicially, affords not any presumption of an intention to change the nature of it to moveable, but rather to employ his money upon another heritable security more to his likeing ‡.’ This reasoning is good in itself, but not applicable to the law, which never admitted a contrary presumption. The intention of the creditor was not the object of the rule ;

* Vide the style in the Office of a Notary Public.
1635, Hamilton.

† Page 174.

‡ Durie, 29th Jan.

rule ; it was the protection of the debtor from double distress, both in his person and effects.

We are now arrived at the last and most common method by which the wadset is extinguished, we mean, the *order of redemption* used by the reverser. Craig says, that reversions are *stricti juris*, because they relate alone to feudal property ; and all feudal grants originally were *strictissimi juris*. This may have been the reason ; but it is not satisfactory ; for, although benefices, or free grants, should never be extended beyond their precise words, reversions, being in their nature opposite, and intended to restore people to property which they had quitted for less than the value, should have been liberally interpreted. It is not impossible that the writers of reversions drew this consequence upon the transaction, by their extreme anxiety in stipulating the time, place, day, hour, and every circumstance of the form. This minute attention had doubtless the security and certainty of the reverser for its object. The effect, however, proved just the contrary of expectation. Wadsetters insisted upon the literal performance of every item stipulated against them by their parties ; and the Courts could hardly refuse to exact performance from them of what they had provided for their own security. This led to a literal interpretation, for which the Roman term *strictum jus* was at hand ; and the *points*, as they were called, of the reversions, became the wadsetter's chief defence. That the case of reversions was favourably regarded by our old law, cannot be doubted. The act of James III. rendering reversions effectual against singular successors, and appointing a register for their preservation, with the subsequent laws respecting them, demonstrate a national inclination to preserve the right of the ancient possessors of the land, and to facilitate the recovery of it when out of their hands

Could we know in what manner, and by what rules, the wadsets preserved by Skene were redeemed, it is probable the interpretation would appear extremely different. But, when the Roman law be-

came the law of the land, to the exclusion of our ancient customs, the analogy of the order of redemption to the *actio prescriptis verbis*, in which the party stood bound to precise and literal performance, was observed. Hence the minuteness of the stipulation itself, the analogy of the Roman form, and the feudal idea respecting land property, concurred to make an order of redemption a work of difficulty, chicane, and delay. 'The formality of the redemption' (says Lord Stair) has the importance of the whole *. Nay, he gives an instance where the Lords had actually been obliged to dispense with their rules in favour of a poor reverser, to whom the wadsetter had long given defiance. The case is declared 'not to be drawn into example, in respect the pursuer had sustained great trouble by actions against the defender for recovery of his reversion †.'

As to the person to whom the premonition is to be made, Craig tells us ‡, 'That, if the granter of the reversion be alive, he is solely to be premonished, without regard to his heirs, though they have attained base rights upon the wadset lands: If dead, that his heir is to be called;' and 'nihil interest jamne hereditatem adierit an non ||.' By the statute of James III. (continues he) the heritable possessor is always to be premonished; but he adds, that, in a case between Scrymgeour of Duddop and Lord Gray, the Court found premonition to the granter of the reversion sufficient, without regard even to the possessor upon base rights; but he disapproves of the decision, as being, no doubt, a deviation from the statute. Since the establishment of the record, precise information is thence to be had as to the person or persons in the right of the wadset, to whom accordingly the premonition is to be made.

So much did creditors and money lenders avail themselves of the difficulties which the strict interpretation of reversions threw in the way of debtors recovering their property, that they were not ashamed

* Page 346.
|| Sect. 12.

† 21st Feb. 1635, Earlston.

‡ Page 22.

particularly described in the instrument by its name, and by the town or parish in which it is situated. The residence also of the party and of his family should be mentioned. An omission of this kind annulled an instrument of premonition *.

A personal premonition is, in all cases, the surest. Thus, though the parish church, in one case, and the city of London, in another, were the places specified in the contract, personal premonition was in both these instances sustained †. If the wadsetter be a minor, his tutors and curators must be premonished, in virtue of letters of supplement, at the market cross of the head burgh of the jurisdiction where the minor resides, or otherwise each of them must receive it personally. When the party has a fixed residence, but cannot be personally found, the practice is, from the analogy of common execution in these cases, to annex a declaration of that circumstance to the instrument. It now only remains to be noticed upon this branch of the business, that, if premonition be made by an assignee or singular successor in the reversion, the singular titles must be produced and read, and mentioned to have been so produced.

The wadsetter being thus lawfully premonished, let us proceed to the next step of the business. At the day and place appointed, the reverser or his procurator attends, with a notary and witnesses, from mid-day to sunset; for, (as Lord Stair observes), ‘one hour is too punctual a term for consignation ‡.’ If the party premonished appears, the procurator reads the contract of wadset, or deed of reversion, or refers to it, if in the hands of the other, together with the instrument of premonition, and then lays the money down upon the table, and offers to perform any thing incumbent upon him by the reversion. If the wadsetter does not appear, (to use Lord Stair’s words), ‘the liquid sum must be shown to be in bags, which at the view may carry some proportion to the reversion; but it is safest to sort and place the money on the table, that it may quickly be told,

* 13th December 1626, Earl of Buccleugh.

† 1638, Finlayson, and 2d February 1667, Creditors of Murray.

‡ Durie, 11th December

‡ Page 587.

‘told, lest the wadsetter come not till sunset.’ Supposing him not to come, or to refuse, the money must be consigned, as directed in the reversion, ‘public intimation being first made, by calling the wadsetter at the most patent door, and an instrument of consignation ‘extended *.’ The wadsetter is called not only to receive the money, but also to receive performance of every thing incumbent upon the reverser; and this general offer has been sustained, as removing a number of objections †. The money is (according to Lord Stair’s caution) told down, though the production of a bag has, in this case, been sustained ‡. Another reason given, and commonly occurring, is, that the wadsetter did not offer a sufficient renunciation, the principal part of which is a procuratory of resignation. Such an offer was found equivalent to none; nor was it judged incumbent upon the reverser to have another prepared §.

If a person be named in the reversion as consignatory, the loss arising from his bankruptcy, or other causes, must fall upon the wadsetter, who ought to have prevented the consignation, by accepting the money offered to him §. This is in terms of the Roman law, and the decision 28th July 1663, Scott. It is a very nice point, dependant upon a number of circumstances, particularly the regularity of the order used. In general, Craig informs us, that law inclines to throw the danger upon the reverser, in order to prevent frauds, which might easily be committed in this affair. Where no consignatory is mentioned, this rule takes place, and then it becomes a prudential step. The practice is, always to consign in the hands of people in creditable offices, such as the Clerks of Session, the Clerk to the Bills, the Treasurer or Dean-of-guild of Edinburgh, or in any of the Banks. To treat the matter of consignation as it deserves, would lead too far off the road; especially as the framers of wadsets, and other redeemable rights, are always careful to declare, that the consignation is to be upon the peril of the configner.

When:

* Stair, p. 347.
Grierfon.

† Hope,—Wadsets.
‡ 12th July 1634, Lord Balmerino.

‡ 10th March 1630.
§ Erskine, p. 423.

When such consignation is made, it is the configner's business to take a formal receipt and obligation from the consignatory; because the instrument being no more than the assertion of a notary, cannot fix the money upon him in case of his denial; and yet, though he should deny the receipt, the instrument will not be null. It is admitted to prove every other circumstance probable by instrument; and, therefore, if the reverser makes good the sum alledged to be consigned, he need not renew the order.

The necessary form being completed by the instrument, let us consider the legal consequences of it. In the first place, the consignation stops the currency of the interest of the wadset money. In this respect, it is equivalent to payment to the wadsetter himself, who, by the terms of the reversion, consented to the disposal of it in that manner, in case of his own refusal. In the second place, immediately after the consignation, the procurator protests, that the lands are redeemed; consequently, if the order has been properly followed out, the wadsetter, if in possession, becomes, from that day, accountable to the reverser for the rents and profits of the land itself, which are thenceforth held to be disburdened of the wadset.

To carry the business into execution, a judicial measure is requisite. It was incumbent upon the reverser to use a certain order, prescribed by the agreement. The wadsetter, in general, took no notice of the order, and denied that it was legal. Many circumstances, not liquid in themselves, remained to be adjusted, which could not be done by the parties, particularly the terms of the grant of redemption; and the wadsetter continued in possession, and would not remove. All these things rendered an action necessary before the supreme Court, which is the only competent judicature for matters of redemption. The purpose of this action being to declare that the preceding order was legally followed out, behoved to be declaratory, and was accordingly termed a *declarator of redemption*. This action is not necessary, because the wadsetter ought to renounce and evacuate the land without legal compulsion; and therefore the procurator,

rator, in the instrument of consignation, protests that the wadsetter shall be liable in the expence of it. It was formerly noticed, that a reverser could not assign his rights unless it was taken to assignees; not only because the deed was *stricti juris*, but because the right of redeeming was a kind of personal faculty, not capable of being exercised by another. For this reason, lawyers have found, that it may be transmitted after being exercised. A party who has only a personal reversion, if he wants to convey it to another, must first use the order of redemption, and then convey; and the cedent will be entitled to insist in the common action*. The form of such deeds must not be a simple assignment to the reversion; it must be a disposition to the lands themselves, as redeemed by the order, which is conveyed for the purpose of suing the declarator. It is the order which does the business, and the declarator only ascertains that it did so.

If the reverser, after consignation, shall choose to take up the money, (which it has been often determined he is at liberty to do), he thereby passes from, or gives up his order of redemption. The reason assigned for this is, that an order of redemption must either be considered as an offer to the wadsetter, or a stop of diligence; either of which may be given up at pleasure; and hence the money is considered to remain the property of the reverser until decree in the declarator.

If the reverser takes up his money before declarator, he must sue for it if refused, upon the consignatory's receipt and obligation; or, if it is demanded and refused in the course of the declarator, the Court will, upon application, issue letters of horning for the recovery.

A consignatory is not liable in any interest for the money deposited in his hands, because it is presumed that he keeps it dead, ready to be delivered up; and, if he gives it out, the risk, and consequently the profit, is his own †.

Ag.

* March 3. 1639, Murray.

† July 20. 1617, Barclay.—Bruce.

As the order of redemption truly evacuates the infeftment upon the wadset, and the decree of declarator works the extinction of it, M'Kenzie, in his observations upon the act 1617, justly notices, that the records are in this respect defective; as a wadset may appear to be in the person of a party, when, in fact, it is redeemed. However, no instance has yet occurred, of any prejudice arising from that circumstance, because they are not now allowed to remain long upon that footing. The reverser either registers the renunciation, or he makes up new titles in his own person, which go to the record.

We are now to suppose that the wadsetter is willing to allow the lands to be redeemed, and to execute all deeds necessary for that purpose. Let us therefore consider how these deeds are to be drawn, and the proprietor reinstated in his property. By the reversion, wadsetters are bound to grant a sufficient renunciation and grant of redemption, containing a procuratory of resignation, and all other writings necessary for putting the reverser into his former situation; and, in the instrument of consignation, the procurator protests for a renunciation, containing a procuratory of resignation. When the wadset is held of the reverser, the practice has been to insert a procuratory of resignation, *ad remanentiam*, in the grant of redemption; to execute this procuratory, and record the instrument, which effects a complete extinction of the right. Sir Thomas Hope, however, is of opinion, and posterior lawyers have agreed, that a simple renunciation, duly registered, is sufficient for the purpose. 'The reason wherefore no new sasine is necessary, (says he), is because the giver of the wadset was never disseised, he remaining still vassal to his own superior, but alienarily did give a base sasine to be holden of himself, which by the renunciation accretes to the infeftment which he has standing in his person, and is, in effect, a consolidation of the property with the superiority, which remained in his person in wadset *.' This idea of a consolidation of a base infeftment by renunciation, did not appear to our forefathers, in conveyancing, consistent

* Page 244.

consistent either with principle or form. They therefore insisted upon the practice of the renunciation *ad remanentiam*, in which they were undoubtedly right. It is a settled point, that, in the matter of absolute sale, no infeftment can be transmitted, or legally extinguished, by renunciation; but lawyers introduced a distinction in the case of redeemable rights, by considering them as burdens or servitudes upon property, which might be renewed with less formality than is requisite, in alterations of the radical rights. Mr Erskine gives his opinion *, that simple renunciation is sufficient to extinguish wadsets, and quotes Hope for his authority. He does not affirm that a consolidation is thereby affected; he only says, that as soon as the reverser's sasine 'is discharged or disburdened of the 'wadset by the registered renunciation, he must of course be reinstated in the full right of his lands.' The point was determined upon a shorter and more solid reason, in the case, 7th January 1680, M'Lelland against Ruthet. The act 1617 expressly requires the registration of all renunciations of wadsets; and, under the word *wadset*, annualrent rights and other redeemable deeds are comprehended. These renunciations, therefore, are to be good against singular successors, otherwise their registration would not have been required; and, in the case mentioned, the Lords found the resignation, *ad remanentiam*, in these cases not necessary. This alteration, however, being founded only on the words of the statute, the resignation is still retained by conveyancers as the most formal and eligible method of extinguishing redeemable rights.

When the wadset was held of the granter's superior, the reverser stood possessed of a letter of regrefs in the old form: He produced the grant of redemption, with the regrefs, to the Lords, who awarded letters of horning against his superior, for reinvesting him by a new charter.

If the wadsetter has been entered with the superior upon the contract, the superior is presumed, by the condition of the new vassal's

infestment, to receive again his old one upon redemption. Before the act of the 20th of the late King, he would have been obliged to apply in the old form ; but the necessity of the regrefs, either express or implied, is by that act entirely superseded, because superiors are obliged to receive any vassals producing a deed, containing a procuratory of resignation. The method now is, to take from the wadsetter a disposition, proceeding upon a short recital of the wadset and order of redemption, and containing such a procuratory. The old regrefs saved the vassal from paying a new entry either to the superior, the granter of it, or his singular successors, if it stood upon record. By the late act, superiors are only bound to receive vassals upon payment of an entry ; but, whether the implied regrefs from the terms of the contract would save the vassal from this payment to the singular successors of the superior who had entered the wadsetter, is not hitherto determined.

It now remains to consider the style or form of the renunciation, and grant of redemption, when the lands have been held of the reverser *. This deed narrates the contract ; the infestment by charter from the superior upon that contract ; the receipt of the whole sum in the reversion ; and the renunciation and grant of redemption. From the terms used in this deed, viz. *redeemed*, *loosed*, and *outquit-
ted*, we see the reason why it is termed *a grant of redemption*, i. e. an acknowledgment that the order of redemption has been either performed in all its formalities, or specially dispensed with ; for this must either be acknowledged by the party or declared by a judge. It also *renounces*, *overgives*, *discharges*, and *declares* the wadset to be *extinct*, *void*, and *null* ; but not a word insinuating the consolidation mentioned by Hope. The clause of warrandice is carefully limited to the extinction of the wadset, and not meant to be applied to any separate right ; and the writs are not to be preserved, but to be cut and destroyed, in regard the right is to be extinguished.

This

* Vide the style in Dallas, p. 721.

This is one of the few styles given by St Martin which his successors have disapproved. In this case, the wadsetter held of the superior; and the deed does no more than extinguish his right; so that, in fact, nothing remains with the reverser but his bare right of regrefs. The whole property, if anywhere, stands in the superior; whereas the wadsetter, by redispensing with a procuratory and precept, keeps up and returns the reverser's right safe and entire, leaving him little dependant upon his superior. The more approved style of this deed is a compound of a discharge, renunciation, and resignation, in which the right is not said to have become void, null, and extinct by the renunciation; but the wadsetter confesses that the lands are redeemed; that all the points of the redemption have been fulfilled; and, to render the renunciation effectual, by extinguishing the wadset, the procuratory of resignation is granted *ad perpetuam remanentiam*.

Since the last rebellion 1745, which made a very sensible difference upon this country, by increasing its trade and the current cash, wadsets have gone much out of fashion. Formerly, a man of large property, but who saved little from his income, often chose to provide his younger children, or satisfy creditors, in that manner. His estate he judged not to be diminished; because, so soon as his heir had the good fortune to get money, the redemption was in his power. In the north and west parts of the kingdom, the wadset was long particularly prevalent; and thence a number of small families were supported by wadsets held of the chief or principal family, and where long possession had in a manner purified their right, and given them a title. A number of these wadsets, held of the forfeited proprietors, were redeemed by government after the year 1745, and they have ever since been decreasing in number. The augmentation of the rental has, since that time, been rather too much the aim of our land proprietors; and no measure led to that end more directly than the redemption of wadsets.

In the Highlands the wadsets were generally proper, in the low countries improper. In the latter, the proprietors chose to retain possession, and to improve their lands. In the Highlands, improvements were later of being introduced; and the lands, for most part, are only proper for grazing. The difference of their annual produce, therefore, depended upon the price of cattle, and the greater or the lesser severity of the winter, and so are extremely well suited to the proper wadset, the essence of which is, that the holder may either gain or lose more than his interest; and the chance of the one entitles him to the other.

This species of security was of late years revived for the purpose of creating or multiplying voters, in the elections of our county members of Parliament, a practice which happily does not meet with general approbation, and which, it is hoped, will soon be done away. Bonds of provision, for some time, have entirely superseded the wadset, in the matter of the provision of younger children. In wadsets, however, the younger brother or sister had an advantage sufficient to stimulate the redemption by the heir, without any direct right, to distress him, by calling for their money; and, in imitation of this, heritable securities of provision were also given, about the same period, without requisition; which was wrong, because the child provided had no possession; and, though he had, could get no more than his interest. St Martin *, therefore, recommends the continuation of this practice in strong terms.

The form of the wadset being thus discussed, will render the next redeemable securities of *annualrent right and heritable bond* short and easy. In the history of this deed, we said, that, in the time of Charles I. and II. it consisted of a wadset of an annualrent equivalent to the interest of the sum lent, containing the power of redemption, upon the one hand, and requisition, on the other; and that the requisition was afterwards altered to a direct personal obligation, from which period the annualrent right assumed the title of *heritable bond*.

* Page 705.

bond. St Martin gives us two of the forms then in use, which we will examine in their order, and thence come forward to the more modern style. The oldest form consists of the following clauses, viz.

1. The *receipt and discharge* of the money borrowed.
2. The *obligement to infest* in an annualrent furth of the lands corresponding to the law for the time, and that by double infestment ; the reason of which was, the frequent change of the rate of interest introduced by Parliament from time to time, according to the state of the nation.
3. The *procuratory of resignation*, in order that the annualrenter may enter with the superior, exactly as if it was a part of the land itself.
4. *Clause of warrandice*, which most properly includes the lands.
5. *Assignment* to the maills and duties, with power (it will be remarked) to sue for them by a poinding of the ground.
6. *Obligement* to enter the creditor *gratis*, in the event of the annualrent being held of the granter.
7. *Clause of redemption*, with a proviso that other debts should be previously paid up. This is an attempt to take security for sums to be lent, which was afterwards justly repudiated. At any rate, it seems here to be quite improper, and even inconsistent. In a wadset, the lands themselves are wholly alienated, and an eik to the reversion only adds a further debt or burden. But here the security only extends to a fixed annualrent, for which a full value has already been paid. To add, therefore, any thing to it, is doing nothing at all ; for still the real security will be for no more than the principal sum and the bygones. Such, it seems, was the prevalency of eiking, that the distinction was not perceived ; and St Martin, in giving the form, has omitted to notice the error.
8. *Clause of requisition*, with a dispensation of all the legal forms which the law had prescribed in these cases ; which shows that these forms had become troublesome, and points out the reason of changing the requisition for the bond. The Writers of these days seem

to

to have thought, that the law, in every case, must yield to private agreement. The granter of this deed taking in the persons of future minors, his successors, and dispensing with the calling of future tutors and curators, is equally ridiculous, as it would be ineffectual. It was the requisition by which alone the penalty became due; and it was the practice to stipulate for it separately, and often to exact it likewise.

9. *Proviso* that the requisition should not hurt the investment, a matter already explained at full length.

10. *Clause of registration.*

11. *Precept of sasine*, to be held either of the granter or his superior. This method of making the precept expressly alternative, was at all times exceedingly proper, but is now omitted, because the law has so explained all precepts. There is nothing in our forms that Writers are so apt to mistake, and therefore as much of the old style might yet be retained as would prevent these blunders. The symbols are earth and stone of the lands, and a penny money upon the ground, for the annualrent, *as use is*. This use is very ancient in Scotland. Craig, considering an annualrent as a right or servitude upon property, not a property itself, says, ‘Sed quid de investitura jurium dicemus? Nam hac tradi corporali aliquo symbolo non possunt, veluti si annuus reditus ædibus aut agro imponatur, denarii fit traditio, et sic de aliis *.’ Conveyancers and notaries, it seems, chose to consider an annualrent as something more solid: It issued out of land; and, in old annualrent rights, the dispositive clause often bears, ‘And the said lands themselves, so far as concerns the said rents.’ They therefore added the symbols of earth and stone also, which practice came to be universally adopted in St Martin’s time. The practice has since been continued, altho’ all our writers, from Craig downwards, agree, that a penny money is the proper symbol for a money annualrent, and a parcel of corn or victual, if it be payable in victual. Others have insisted upon both earth and stone, and the penny,

* Page 187.

and such has been the style of rendering conditions real, or to create *debita fundi*, ever since. In ancient times, the creditor stood possessed of the deed containing the reversion; and it was often difficult to force him to produce it, which introduced the contract with doubles to each party. The registers enabled them to return to the old method of engrossing the reversion in annualrent rights, because the *safine* going upon record, furnished them at any time with the terms of the rights; and an extract from the register was agreed upon to answer the purpose of a separate reversion. In wadsets the contract continued, because a number of points occurred to be settled between the parties, which could only be done by that species of writing.

The next form is properly that of the *heritable bond* *. The difference in the first clause of this deed is no other than the adjection of a common personal bond. The heritable right is granted for the creditor's further security; and it consists of similar clauses, ranged in the same order, as the former one. In place of an annualrent, the creditor is here infeft in the lands themselves. The casualties are taxed to half a merk during the creditor's possession, which is a very proper method, and is generally followed. In a common right of annualrent, the creditor could levy no more than his yearly sum; and the moment that sum was paid, the land was discharged for the year. If the proprietor fell into indigent circumstances, he granted new rights, or the lands came to be affected by apprisers; so that the annualrenter had an annual conflict for his money; but, by being infeft in the lands themselves, so soon as the debtor ceased to pay in consequence of the personal bond, the creditor, in security, could uplift the whole produce, and apply it to discharge his debt.

We have hitherto said nothing of the tenure of annualrent rights, having reserved it for this place, upon an obvious account. Of old, they were seldom or ever held burgage, because the ancient custom in burghs had been to charge their property with rents, or to constitute

have read, dispensing with the casualties, and disponing them to the creditor.

In the 1st Parliament of William and Mary, c. 42. the hardships attending annualrents falling in non-entry were taken into consideration; when it was enacted, that superiors, in case of non-entry, are thereby only entitled to the blanch duties, or other duties mentioned in the infeftment, until citation in the action of declarator; so that now the casualties of an annualrent are of little consequence, and the claim we have been talking of, of the less importance.

The personal bond being then introduced in place of the requisition, and the infeftment over the whole lands, in security, becoming common in place of the annualrent, a great alteration followed in the construction and consequences of these securities. Formerly, an annualrent right was properly a wadset of annualrent; the creditor had no title to uplift more than the sum of interest agreed upon, or to demand the principal sum until he had executed a requisition. This requisition gave access to the person of the debtor, but gave no further right over the lands. If the annualrenter wanted his principal sum out of these, it behoved him to apprise or adjudge, and follow the same course as any other creditor. The same thing took literally place in the wadset; and, therefore, annualrent rights were deemed to come under the statute 1617, and to require registration of all discharges of the principal sum; but now, when these rights were converted into heritable bonds, in which the personal obligation was evidently the essential, or principal part of the deed, and the infeftment only an accessory, they could no longer be considered as wadsets, or purchases of annualrents. Being purely securities for debt, it was plain that the personal bond might be paid or extinguished by intromission with the property of the debtor; and the debt once in any manner paid, the heritable accessory security must have fallen. If this was the case in heritable bonds with infeftments of annualrent adjoined, there could no doubt remain as to these other bonds with infeftments in security, which entitled the creditor to a
total

total intromission with the debtor's property, in the same manner as an apprising or adjudication. If every shilling, then, taken above the annualrents went to the discharge of the principal sum, it followed, that debts constituted by the new heritable bonds were extinguishable by intromission, by discharge, or renunciation, without going to the record; and, in short, with as little ceremony as any other ordinary contraction; and so it was solemnly determined*.

The holders of money seem quite insatiable in the matter of security. Not satisfied with the personal bond, joined either with the right of annualrent, or the infeftment in security, they chose to have them altogether in one deed; and hence arose the present established form of the heritable bond. Though the infeftment in security had been devised in the time of St Martin, and became frequent towards the end of the last century, yet, for a long time, it was used with caution. The tenure of the land behoved to be known with certainty. If it happened to be ward, the consequences were dangerous, as infeftment in the property was considered in the light of an alienation, a circumstance which did not apply to annualrents: But, ever since the abolition of ward holdings, the heritable bond has uniformly given the creditor both an annualrent out of, and an infeftment in security over, the debtor's lands.

We are now pretty well prepared to consider a *modern heritable bond*. It consists,

1. Of the *recital* or *acknowledgement* of the loan.—The only circumstance here material applies to all bonds, viz. that the time of the actual advance of the money be specified, in order to leave no dispute about the commencement of the interest.

2. The *personal bond* in the usual style.—Interest, in heritable bonds, was generally made payable twice a year, to answer the exigency of the creditor, who trusted to it for his subsistence, and the income of the debtor, who received it at Whitsunday and Martinmas.

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* July 8. 1680, Ranken against Arnot.

3. The *dispositive clause* both of the annualrent and of the lands themselves, and whole profits thereof.—This leaves the creditor at liberty either to uplift his precise annualrent, or enter upon the whole produce for payment of the debt itself.

4. The *obligement to infeft, and procuratory of resignation*.—The annualrent to be held blanch, and the lands either *a me*, or *de me*, in the option of the creditor. In general, creditors choose to hold of the grantor, for the convenience of getting their titles completed to their property at little or no expence; and, upon this account, it is not uncommon to omit altogether the procuratory of resignation, and to insert in its place an obligation to grant all such writings as may be afterwards demanded, in case the creditor chooses to hold by resignation of the superior. While ward-holding subsisted, and the tenure of the land was ward, or not known, the principal danger, as before observed, lay in the insertion of a precept, or the taking infeftment upon it. A procuratory, at that time, was the only safe form; and a charter of resignation behoved, as soon as possible, to be obtained from the superior to secure against recognition. Even when this was done, unless the ward was taxed, the heir of the creditor, by becoming a ward vassal, ran the risk, in many cases, of being subjected to casualties superior to his debt, than which nothing could be more unreasonable or unjust. It was consequently a rule in business, that no money was lent upon ward lands, or heritable bonds taken upon them, without the express consent of the superior. The creditor instantly entered with him, and no precept was inserted in the bond.

5. The *clause of warrandice*.—In the old annualrent right this was absolutely necessary, because it was a purchase, and therefore behoved to be warranted. In the succeeding one, containing a power of requisition, it was less so, because the requisition gave access to the person, and the warrandice could do no more; but in the modern heritable bond it is rather superfluous. The bond is sufficiently binding upon the person. The land security is previously examined and trusted to; and, if that fail, the warrandice can add nothing to the force

force of the bond. This clause, therefore, is retained, merely because it is common to all transmissions of heritage.

6. The *obligement* to enter the creditor, and his heirs, has been sufficiently explained.—Where the debtor holds of the Crown, the expence of making up public titles to a debt would be intollerable. By holding of the granter, the heir is safe in every event; but this is not altogether the case in a public holding of the granter's superior; for the act of parliament only directs the blanch duties to stand in place of the non-entry before decree of declarator be obtained. Should the superior obtain such a decree, the heir would be liable in the full annualrent until his entry, a circumstance which affords an additional reason for holding of the granter in all cases of this kind.

7. The *assignment* to the writs and titles of the lands.—As the creditors chief security depends upon the land, and his infestment gives him a total right of possession, it is therefore reasonable that he should be furnished, or at least have right and access to the proper materials for his defence, against all parties pretending to claim in preference; or for the purpose of completeing his own or his author's title, in case of defects or omissions appearing posterior to the loan. In practice, the writings are not delivered. It is a rule, that the person having the capital interest in an estate is always custodiar of the writings, being most concerned in their preservation: A debt is no more than a burden upon the estate; and, therefore, an inventory is generally made up and delivered to the creditor, having an obligation subjoined by the proprietor for making them forthcoming when wanted. If he demands them in consequence of this obligation, he gives another for their redelivery when the occasion is served.

8. *Assignment* to the maills and duties.—This, in all redeemable rights, is intended to give the creditor a direct right, in his person, to receive the rents from the tenantry, in the same manner as the proprietor himself could have done. When we come to the matter of the execution of heritable debts, we shall explain the nature and consequences

consequences of this clause at large. Here it is only proper to observe, that, in the end of the last century, when infeftments in security became frequent, creditors were often under the necessity of entering to the possession. It was common to take the proprietor bound to make his tenants enact themselves in the sheriff, sometimes in the baron courts, to pay the annualrent, or the whole of their rents, to the creditor. This is noticed by Spottiswood *, and the clause inserted which we have observed in several old bonds, but better expressed.

9. *The clause of registration*, and its effects, need no explanation.

10. *The precept of sasine*.—In this there is nothing particular. Practice, for a long time, has transferred to the precept the clause of redemption which formerly was in the body of the deed. Notaries sometimes blundered in the recital of these securities in their instruments of sasine. It is absolutely necessary that the conditions, and especially the material one of the redemption, should fully go to the record. Notaries are obliged to insert the precept verbatim; and, therefore, to insure against their ignorance or blunders, the redemption of heritable bonds is always reserved for, and ingrossed in the precept.

Here it may be observed, that the heritable bond differs very little from the right of annualrent, either in the essential clauses or their arrangement. The one has a clause of requisition, the other has a personal bond. The old right was confined to an annualrent; in the modern one, the infeftment extends over the lands themselves; and the disposition is evidently the basis of the whole. Doubts were at first entertained about the consistency of an infeftment of annualrent with an infeftment in security; and, to remove them, declarations were sometimes inserted in the bonds, of the following import, viz. ‘Declaring always the infeftment of annualrent, and the other ‘infeftment of property, to be consistent, and that the same may be ‘exercised either as cumulative or distinct rights, the one without ‘prejudice

* Page 92.

“prejudice of the other.” This clause can do no harm, but it is certainly not necessary, for there is no concurrence or inconsistency in the infeftment.

The disposition in security thus annexed to the heritable bond, was intended to entitle the creditor to a total possession of the debtor’s estate, as a convenient method of obtaining the repayment both of his principal and interest. Where the personal obligation fails, great difficulties occur in the recovery of the capital of a debt, in virtue of the heritable security. Indeed, so stands the law of Scotland, that this is seldom accomplished but by a sale of the estate, either voluntary or judicial. These difficulties led practitioners to the idea of a total intromission, and of taking a power for that purpose, by an infeftment in security, and an assignment to the whole maills and duties. The example was set to them by creditors apprising or adjudging, who by law are entitled to possess their debtor’s whole estate for payment of their debts; and it was right that creditors, by prior infeftments, should be entitled to exclude them. But here new inconveniencies started up. A creditor, taking possession of his debtor’s property, becomes, in reality, a factor upon it; and he must account with the debtor not only for what he actually did receive, but for what he might have received. This lays him under the necessity of doing what is termed *exact diligence* against the tenants, and of keeping a distinct and regular account of his intromissions and outlays. The charge will assuredly be made against him by a complete rental of the estate, from which he must discharge himself in the best way he can. If he is forcibly interrupted by other creditors, and debarred from the total possession, he will be liable only for what has been actually received; but the evidence of all this must be carefully procured and preserved, and a legal discussion of the business becomes almost inevitable. In order to avoid these great inconveniencies, Writers have had recourse to the old method of excluding them by the convention of parties; and, for that purpose, the following clause is seldom omitted in a modern heritable

heritable bond *. Debtors seldom hesitate at this proviso : But, whatever liberty seems thereby to be given to the creditor, it is not advisable either to make a capricious use of it, or to relax in the application of the common rule of intromission ; for it is to be remembered, that creditors upon heritage have oftener to account to one another than to their debtor ; and, when that is the case, the account comes to be instituted upon very different principles.

Before going further, we shall here take notice of a point in practice never omitted either in the purchase of land, or the lending money upon heritable bond. When employed to lend money upon this security, we are first to examine the titles which the borrower produces to his land. Then we are to require a search of the records, in order to discover what incumbrances are already upon the estate. No purchase is made without such a search, and

* ‘ And further, it is hereby provided and declared, that in case the said A. S. or his forefairs, shall think fit, at any time hereafter, to enter into the possession of the said lands and others foresaid, or to the uplifting the rents, mails, profits, and duties of the same, or any part thereof, either by virtue of the investment of property in security to follow hereupon, or of the foregoing assignation to the mails and duties thereof ; then, and in that case, they shall be only liable to hold count for their actual intromissions with the said rents, mails, profits, and duties, according as the same shall be instructed *scripto vel juramento*, after deduction always and allowance to them of what they shall happen to deburse for reparations, cesses, ministers stipends, school-masters salaries, and other burdens of whatsoever nature, whether incident or incumbent, affecting the same any manner of way ; and after deduction and allowance of what charges and expences they may be at in maintaining and defending their right to the said lands and others already mentioned, or their possessions of the same, by these presents ; and that they shall be nowise liable for diligence, or the insolvency of tenants, or for omissions : And also, that it shall be lawful to them to relinquish, give over, and again reassume the possession of the said lands and others already mentioned from time to time, as they shall see fit, without being obliged to make any intimation to me or my forefairs, or any other person whatever, of their so relinquishing or reassuming of the said possession ; and that no possession or intromission shall be presumed against them, save what shall be instructed *scripto vel juramento*, as said is ; under which provision these presents are accepted by the said A. S. allenarly, and no otherwise.’

and no money ought to be lent without it; for it is not to the man we are trusting, but to the estate. The estate is the debtor; and therefore every circumstance attending it is of the utmost importance. The total neglect or inattention to this particular has lately proved ruinous to many families in this country; and the general distress which has fallen upon the landed property, has brought to light a number of estates, affected with voluntary heritable securities, to double and treble their value, which could never have happened but either by the implicit confidence of the lenders, or the supine negligence of their doers. If one man is to trust another, let his security be personal. If he looks to the land, let him do it with effect, so as nothing may be left undone; for it has an awkward appearance, to betray a want of confidence in the person by taking real security, and then to fail in rendering it effectual; nor is it always the fault of the proprietors, who are apt, even in good faith, to put values upon their estates which prove to be ideal. Upon the same principles, it is advisable to take immediate investment upon an heritable bond; and, for that purpose, the instrument is generally prepared at the same time with the bond itself.

Sometimes, however, this is delayed, and the lender finds he has use for his money sooner than he at first imagined. Loans upon heritable security are attended with considerable expence, and therefore it is always expected that the sum is to lie for a considerable time. In place, therefore, of recalling the money, the holder of the bond, in the event mentioned, either by himself, or with the debtor's assistance, gets another person to advance the amount upon an assignation. At other times, the creditor in the bond is obliged to convey it upon his own account before investment taken.

In either of these cases, the assignment consists of the following clauses:

1. Recital of the bond to be conveyed.
2. Receipt for the value, or the cause of granting.
3. Conveyance to the annualrent and lands.

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4. Conveyance to the bond, the sums contained in it, and to the unexecuted procuratory.

5. Redemption. And,

6. Warrandice from fact and deed.

Upon this occasion we must again mention, that the charter or disposition is the basis and the model of all our deeds of transmission. The heritable bond being truly a disposition of an annualrent, contains all the clauses of the disposition, and preserves their original arrangement: So the assignation is exactly a conveyance to a disposition upon which no infeftment has followed, and the parts are in the same order. The heritable bond contains a personal obligation for the debt, and an heritable security accessory to that debt. The conveyance ought to transmit first the personal debt, and then the accessory security, in the same order as they are often separately used; but this order, by the ordinary form, is altered. The accessory security, or annualrent, is first conveyed, and then the personal bond; and its contents are classed in with a separate assignment to the other clauses in the heritable bond, which confounds the two securities together in a very awkward manner. So custom, however, has established it.

A transaction of the species we are talking of is a sale of the debt. The doer, therefore, for the purchaser ought not to be satisfied with seeing the search of the records upon which the money was originally lent; he ought also to have an additional search of the inhibitions up to the date of the assignment; because the security having remained so long incomplete in the person of the creditor, he may in the mean time have granted a back-bond, or other counter obligation, qualifying his security; and inhibition used against him upon this, would strike against the transmission, and affect the infeftment, of the purchaser.

An assignment to an heritable bond may be intimated; and, in that shape, it will no doubt carry the annualrents due, or that become due, so long as no complete right appears to interfere with it; but

but all these annualrents, not actually uplifted, are carried by the first complete right ; and therefore, in all incomplete real rights, the effectual step is to take infeftment, and record the sasine, which answers the purpose of intimation of the personal debt, and completely transmits the real security. A creditor in an infeftment of annualrent conveyed it by assignment. The assignee neither intimated his right, nor took infeftment. The creditor ventured to discharge the debt ; and this discharge effectually extinguished it, in prejudice of the assignee *.

It very seldom happens that an heritable bond goes further than to one assignee in a personal shape ; but, if it should do so, the deed is only lengthened by a recital of the assignment, which is the title of the granter. The dispositive words of the annualrent are marked by the addition of the words *again sell and convey* ; and, in place of *assign*, we *transfer* the personal debt.

Returning from the supposition of assignment and transfer, to what most commonly happens, *i. e.* that the creditor takes immediate infeftment upon his bond ; and if, after being infeft, he sells his debt, a disposition and assignation of the bond and infeftment is to be prepared ; and here the deed returns entirely to the form of the disposition. It is purely a disposition of an annualrent, and the lands in security, with an assignment to the personal bond. The warrandice in these conveyances is from fact and deed alone ; and, whether expressed or not, that warrandice is implied in the nature of the transaction. In transmissions of debt, even absolute warrandice, whether *per incuriam* or intentionally so expressed, will not make the granter answerable for the solvency of the debtor, or for the debts being made eventually effectual, and will only extend to a guarantee against all legal exceptions. If more be desired, a separate and special obligation should be taken, as there is certainly no possible event concerning which agreements may not take place between parties.

* 8th. June 1714, M'Dowal.

It is common to recite the clause of redemption from the bond verbatim in the precepts of dispositions of this kind, but that precision is certainly unnecessary; as a general reference to the bond itself is sufficient.

We have supposed that the creditor in the heritable bond had taken sasine upon the debtor's precept, and, in that situation, granted the preceding conveyance. Now, in that case, the procuratory of resignation remained unexecuted; and therefore, in place of a new procuratory, the preceding disposition should have contained a precept and an assignment to the unexecuted procuratory contained in the bond. This puts it in the power of the disponee either to infest by confirmation, *i. e.* upon the disponent's precept, to be confirmed by the debtor, or by resignation in the hands of the debtor's superior. X

The disposition given by Mr Dallas is not properly or directly suited to this purpose, though it is commonly followed upon the occasion. It contains a second precept, and a second procuratory. The second precept is quite right, because the first one has been executed; and an infestment taken upon the second may either be confirmed by the debtor, or both of them may be confirmed by the debtor's superior, at the pleasure of the holder: But, if the disponee makes up his titles upon the second procuratory, he then makes his choice, and comes directly to hold of the debtor, losing sight, in a great measure, of the debtor's superior. This, indeed, as matters now stand, is no loss, as has been already noticed. However, it is requisite that the difference of the things should be fully explained and understood. If the creditor disponent had obtained from his debtor's superior a confirmation of his double infestment, or had taken infestment upon a charter of resignation from the superior, a second procuratory, and a second precept, were necessary in his conveyance. We shall suppose the title made up in this manner; in which case the disponent obliges himself to infest the disponee, to be held either of himself, or the superior of the creditor in the bond, and grants a procuratory for that purpose; and directions are also given for conveying the

X It seems pretty clear, that this ^{curtitles} would
take up no more than the ^{superior} ~~superior~~
The property, would still remain in the ^{creditor} ~~creditor~~

titles obtained from the superior: But, though that method may be followed, the form is extremely ill chosen; because titles are very seldom taken from the superiors of the granters of heritable bonds. The best method, in these transmissions, is to grant precepts, and to convey specially the first unexecuted procuratory, whereby, if there be real occasion, the creditor, or his heirs, may at any time evacuate the whole train of base infeftments, and hold of his debtor's superior. X -

We know only of one case in which a second or third procuratory, from disponees infeft base, can be of any use; and that is, if the debtor and his heir refuse to confirm, they may be charged with horning upon the act; but this is not a probable event; and the execution of the first procuratory in the superior's hands would be an immediate and deserved punishment.

The next probable event is, that the debt is ready to be paid up by the proper debtor in the original bond, when a *discharge* and *renunciation* is to be granted by the creditor, which is exactly the renunciation and grant of redemption of the wadset. The clauses and the order being the same, all the observations formerly made apply to this deed of extinction. As in the wadset, so here, likewise, conveyancers, walking close up to feudal principles, have insisted upon the insertion of a procuratory of resignation *ad remanentiam*, and upon the regular execution of that procuratory. In wadsets, good reasons appeared for this strict regularity. The lands themselves were absolutely conveyed; and an infeftment so much divested the reverser, that a simple discharge of the faculty of reversion completed a right to the lands in the person of the wadsetter. But an infeftment of annualrent, or security, is only a burden or servitude upon the property, which remains entire in the debtor. A renunciation, therefore, ought completely to remove or extinguish this burden; and so our Judges have again and again determined. Considering, also, the heritable security as no more than an accessory right to the personal obligation, and not a wadset of an annualrent, it was mentioned, that

+ This seems a repetition of the same Error, as at p 274. in which a note is made

that the Lords do not consider it as coming under the act 1617, and, consequently, that it is extinguished by a discharge and renunciation, even without being recorded *. Writers, however, have persisted both in inserting procuratories of resignation in the renunciation of heritable bonds, and in recording them in terms of the act 1617; for which purpose, the clause of registration specially points out that record.

The registration is undoubtedly expedient, if it is not necessary. Like the charge and discharge of an account, the investment and the renunciation meet one another, and prevent a number of doubts and inquiries which might otherwise give purchasers uneasiness; and the distinction, though laid down by some late writers, and supported by a single decision, is by no means established. So far from it, that in a case †, where a discharge of a part of an heritable bond was taken back by the creditor from the debtor, the whole debt was in consequence found to subsist. Had the discharge been registered, there was an end of the matter; and in that, and several consecutive decisions, it is taken for granted, that a personal discharge does not extinguish an investment without registration. The practical rule, therefore, is, never to omit the recording of these deeds. Conveyancers, here again, as in the wadset, stand upon the old maxim, that every investment must be extinguished by resignation. In the transmission of land property, this is no doubt an axiom; but Mr Erskine is not of this opinion in the case of redeemable rights: ‘As the debtor in a right of annualrent (says he) continues proprietor, notwithstanding the impignoration of the rents to the creditor, it is not necessary, nor indeed congruous, for the creditor to make over, or surrender, the lands, after his right is extinguished by payment; for resignation cannot be made but by him who is at the time vested with the property of the lands to be resigned.’ Though the position itself may be right, the reason assigned is certainly not so solid. It is quite opposite to the case of Campbell, just quoted; for,
if

* July 8. 1680, Ranken.

† June 19. 1745, Campbell.

if the creditor's right or title in the land vanishes, *ipso facto*, by the receipt of the money, the return of the discharge would not have availed the creditor, and his debt, *quoad* the land, behoved to have been held to be paid. It is contrary to many other instances we could mention; but it is enough to say, that it is contrary to the whole system of the forms we have been considering, all of which proceed upon the idea, that the creditor's right, or real hold of the lands, remain in him until it is extinguished or conveyed by his own deed. This we hold to be more especially the case when the annual-rent, or debt, is held of the debtor's superior; for then it is in a manner out of his power altogether. It is a property, or estate, which has been separated from him, and, therefore, ought to be formally restored. So far, however, has practice yielded, that, although the procuratory of resignation be continued, it is not executed, but simply put upon record.

We shall conclude this long discussion of redeemable rights with Lord Stair's advice concerning them, which, as it regards our immediate practice, deserves attention. 'These who purchase wadsets, 'infeftments of annualrent, or property, for security of sums, run 'the hazard of satisfaction and payment of these sums, by intromission or otherwise, wherein there is little inconvenience; for no man 'should purchase a redeemable right without consent of the reverser 'or debtor *.' It is evident, from what has been just said, that the records give little or no security in these cases; and, therefore, the consent of the debtor, expressly taken, is the best method of excluding all after exceptions to the debt.

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THE creditor having got complete heritable security on the lands of the debtor for his money, we are now to examine into the right which he has to recover the sums annually due to him, together with the forms and mode of effectuating it prescribed by law; which will lead us into an investigation of the origin, and the different circumstances attending the right called by our lawyers *debitum fundi*.

We must here, again, beg attention to some of the most material circumstances attending the original feudal contract. When the vassal failed in the performance of the services due to his lord, the consequence was, a forfeiture of his feu: The conditions inductive of the grant not having been performed, it fell to the ground, and matters returned to their former situation. These duties often increased with the wants, situations, or necessities of the lords; and, in military tenures, the performance of the tenant was difficult, and his failure often fatal to his right. The defence of the kingdom depended upon the obedience and alacrity of the military vassals, in fulfilling the conditions of their tenure; and, for that reason, knight-service in England, and ward-holding in Scotland, long retained the exactness and severity incident to the original nature of their warlike institution. In other tenures by different services, such as soccage and feu, the defence of the nation was not concerned. The immediate interest of the lord seemed to be the only thing in view; and, therefore, an absolute forfeiture appeared too severe a consequence of the tenant's failure. The dues of the lords being fixed and certain,

tain, were capable of receiving an adequate recompence; or, in other words, he could suffer no damage but the delay. Even that delay might be valued; and, therefore, the forfeiture was softened into a seizure of the possession of the lands, until satisfaction should be made by the tenant.

A seizure of a man's whole estate behaved effectually to prevent him from making payment, or performance of his services and duties, unless he had other lands sufficient to enable him to do so; and, therefore, this exclusion from his property went out of use, as destructive of the purposes for which it was allowed. In place of the land itself, a seizure of the cattle, and other moveables, was adopted; and, if the duties or services were personal, this method soon distressed the tenant or vassal into compliance. Though the claim lay in money, still it proved effectual; for rents were low, and the cattle and moveables were always sufficient to discharge the failure. The military tenures in the South, came at an early period, to be converted into money, or services certain. Thus changed, they were termed *escuage*; and, therefore, being reduceable to a certainty, or, as we say, to a liquid demand, distress naturally became the universal remedy in the hands of the lords. The English lawyers tell us, that this distress was adopted in imitation of the Roman law, which directed the moveables of the debtor to be first seized and sold, before the land could be touched. The right of the lord, however, did not properly affect the moveables; it affected the lands themselves; and this gives us the reason why these goods did not, though taken, become the property of the lord, but only remained with him as pledges, to force or distress the tenant into performance of his duty.

In thus accepting a power of distraining for their dues, the lords did not exchange or renounce the real right of re-entry to the lands, in the case of obstinate refusal, continued failure, or delinquency, upon the part of the vassal. On these great occurrences, the right of the lord to the lands, or to the *dominium utile*, revived; and hence there remained with us non-entry, escheat, recognition, and the

other burdens incident to feudal property. The distress, consequently, was practised only in smaller degrees of failure, such as the non-performance of duties and services of a fixed nature. It was not accepted in lieu of any claims upon the land but such as the moveables were able to discharge; and, where no moveables were to be found, there the superior was entitled to re-enter upon the land itself. These usages particularly applied to soccage tenants in England, and to feeholders in Scotland; for the lords, as Blackstone justly tells us, 'soon found it necessary to commit part of their lands to inferior tenants, obliging them to such return in service, corns, cattle, or money, as might enable the chief feuditorys to attend their military duties without distractions; which returns, or *reditus*, were the original of rents.'

Grants of this kind, though in the feudal form, resembled, in every other circumstance, the *emphyteusis* of the Roman law. The perpetual nature of this right made it pass not only to the heirs of the tenant, but to his disponees, or singular successors. The emphyteutic grant, therefore, was considered neither in the right of an absolute sale, or a lease, but as a right distinct in its nature and qualities from both. There was one condition inherent in the nature of this contract, that, unless the tenant made payment of the rent, the right fell to the ground; and the granter of it might have re-entered, and ejected the tenant, although the contract contained no condition of that kind. The space in which this forfeiture took place was limited to three years; and what appears singular is, that the re-entry of the original proprietor is allowed to be *brevi manu*.

It will be recollected, that the earliest feudal grants were temporary; and that it was only in course of time they grew into perpetuities. When military services were changed for money and produce, the feudal grant came to be exactly the emphyteusis of the Romans; and, accordingly, all its principles were adopted into the construction of that right. The *dominium directum et utile* was acknowledged; and, consequently, the tenant had a separate and distinct

tenant as suffering a forfeiture, and the master as getting a benefit by the improvement or meliorations made by the tenant; and, therefore, no personal claim for payment of the arrears lay against the tenant or the possessor.

The English did not admit into their law or practice the Roman distinction between the *emphyteutae* and the contract of location. Their leases are, in fact, a compound of both; so far as they are still chattels or moveables, they are of the nature of the contract of location; and, so far as relates to the remedy of the landlord in the recovery of his rents, and in the removal or ejection of the tenants, they are of the nature of the *emphyteutae*; for so it is, that, for ages, the English landlord had no other remedy but by distressing the moveables of the tenant; no other method of removing him but that of expulsion *brevi manu*; and next of attaching him by an action of ejection, as if he stood proprietor of the land. The late statutes, made in the beginning of the present century, have, in a great measure, altered the nature of these remedies, and so far brought the lease back to its original character, of a *contract of location*.

If the definition of the *emphyteusis* agreed to the English long lease in most circumstances, it coincides more completely with the Scottish feu-holding, or tenure in feu-farm; inasmuch, indeed, that Sir Thomas Craig constantly uses the Roman term in place of our own. We observed upon a former occasion, that Sir Thomas, from a long study in the principles of feudalism, had become enamoured even with the rigours of that system, and had seriously lamented that the military services should ever have degenerated into returns of money or produce. He is sorry that the socage tenure ever took place in England, or the feu-holding in Scotland. The giving of lands in feu-farms, however, prevailed in this country at a very early period. They were granted exactly in the old English form, *i. e.* by a charter or deed poll, and were considered to be perpetual leases. They were held to be alienations, and therefore not valid without *lascine*.

For

For the same reason, they were liable to forfeiture by recognition; and, in the first act of Parliament which we have respecting this matter, which is c. 71. of the 14th Parl. of James II. the King encourages his nobility and freeholders to accord with their tenants for setting their lands in feu-farm; and, such agreements being made, the act says, 'Our Sovereign shall ratify and approve the said affe-
'dations, so that gif the tenantry happens to be in waird in the
'King's hands, the said tenant shall remain with his feu-farm unre-
'moved, payand to the King sik like farm, induring the waird, as
'he did to the lord.' The benefit of this method of disposing of lands had been sensibly felt in the country long before this period; but the extension of it was greatly limited by the restraints upon alienation, which the act of Parliament of James was intended to remove. Every word in this statute is plainly relative to the idea of leases. The lands are said to be *set* in feu-farm; the right itself is termed *affedation*; and the feuer himself is called *the tenant*, who is in all cases to remain unremoved upon payment of his rent.

Let us now examine into the nature of the right which this emphyteusis, or perpetual lease, bestows upon the tenant. This was a question debated with subtilty and keenness among the old feudalists. The Roman emphyteusis bestowed the entire property on the tenant, burdened with the rent. Upon this the feudalists founded their *dominium directum et utile*. Our Craig, in clearing the distinction between a sub-feu and alienation, has treated this point with great perspicuity. 'Alienation (says he) appears to be a pure and
'absolute disposal of the feu, which cannot be done without con-
'sent of the lord; but subinfeudation is a species of emphyteusis
'in which the vassal is retained, in which he is obliged to perform
'the same services to his lord; nor is the condition of the lord, with
'regard to these services, deteriorated, because the prestation of them
'remains as a burden upon the land: They follow it into the per-
'son of the feuer; and, for the performance of them, it is liable to
'distress. With us, feus are authorised to be given by special sta-
'tute

‘tute for such rent as may be equivalent to the former value at the
 ‘time. He who grants lands in feu, not only retains the superiority
 ‘and quality of direct superior, but also the property, or *dominium*
 ‘*utile*, with respect to the subinfeudation ; for so far he receives the
 ‘value, according to the ancient estimation, and so far he remains
 ‘both vassal and superior *.’ The other cannot be considered as the
 superior, but as perpetual tenant : ‘Non dominus sed perpetuus Co-
 ‘lonus statim reputatur, et emphyteusis nihil aliud est nisi locatio
 ‘ut fundus melioretur et colatur, domibus arboribus et pomariis, et
 ‘viridariis exornetur †.’

This is a very exact definition of the interest of the first granter of the feu, and the feuer or tenant ; but, after all, by acquiring a feu, and being infeft, the feuer gets the real property, or *dominium utile*, of the land. He is in possession of the land itself, under no other burden than the superior’s rent, and may therefore exercise every act of property relating to it ; and, among other things, he may sell the produce, and dispose of it as he pleases.

The Scottish feu-hold is the Roman emphyteusis, executed in the forms of the feudal law, and regulated in all other particulars by the maxims of that jurisprudence, in the same manner as the soccage tenures of England. The rent payable by the tenant being substituted in the place of the ancient military services, is a feudal duty recoverable by the same methods as the other duties or casualties incident to feudal tenures: This matter is well explained by Lord Stair. ‘Infeftments (says his Lordship) of feu are like to the em-
 ‘phyteusis in the civil law, which is a kind of location, having in
 ‘it a pension, as the hire, with a condition of planting and policy,
 ‘for such were commonly granted of barren grounds ; and therefore
 ‘it retains still that name also, and is accounted and called an ase-
 ‘dation or location in our law ; but because such cannot be heredi-
 ‘tary and perpetual, all rentals and tacks necessarily requiring an
 ‘ish, therefore the feu-holdings partook both of infeftments (as pas-
 ‘sing

* Page 470. sect. 22.

† Page 470.

‘sing by faine to heirs for ever) and of locations, as having a pension or rent for their reddendo, and are allowed to be perpetual, for the increase of planting and policy *.’ Since this is the case, the remedy of the landlord must be by distress of the moveables, in the first place; and, if that does not prove sufficient, he must be entitled to re-enter the land into his own possession, and to forfeit the feu.

Let us, in the next place, see what our great writer has left us upon this subject. In explaining the effects of the declarator of non-entry, he expresses himself in the following manner: ‘As to bygones, the superior, by the decret of non-entry, is entitled to distress the goods of the vassal, if any are found upon the lands; but no other goods can be seized but what are locally in the territory. If no other goods are to be found upon the lands, he recurs to the feu itself †.’ In the same manner, he tells us, that distress is competent for the other feudal casualties, as the faine ox, and also for the rents or feu-duties. The mode of this distress is exactly that of the English lord, viz. by the private authority of the superior: ‘Apud nos pro tribus termini immediatè præteritis poterit sua auctoritate distringere ‡.’—‘The overlord may distrenzie, (says Balfour), conform to the reasonable consuetude of his court, and without the King’s letters, his tenants or men’s moveables, goods, and cattel beand within his own bounds of jurisdiction, for sic help as his tenant or man should do to him by law and reason; and therefore, gif the overlord may poind and distrenzie his tenant for the service aught to him, or gif his justice help him thereanent, he may also rather distrenzie them for the relief, and for service aught by them to him for his lands ||.’ In burgal tenements, the same method took place: ‘Gif ony tenant or mailer pays not his mail at the term, it is leifome to his master, without licence of the provost, to

* Page 222.

† Craig, p. 380.

‡ Page 83.

|| Page 126.

‘ to take an poind fra him therefor, within his own land occupied
‘ by the said mailer *.’

Not satisfied with the provisions of the law, superiors took into their assistance the aid of particular agreements, which were termed *clauses irritant*, all of which chiefly respected the recovery of the land itself. Sometimes it was agreed, that, upon failure of the vassal, the superior should only enter upon the lands, and retain them till his claim for bygones should be satisfied; but more commonly, that the feus should be forfeited upon the vassal's neglect for a certain space. The common law borrowed upon this occasion the emphyteutic forfeiture of the Romans. ‘ If the vassal (says Craig) ceased
‘ to make payment for three years, his feu became null and open to
‘ the superior *ipso jure*, although no clause irritant be inserted in the
‘ deed †.’ This rule (says he) was lately introduced with us by act of Parliament: ‘ Et quod magis mirum est, tempus coactatur ad bi-
‘ ennium.’ This act ordains, ‘ That all feuers neglecting to make
‘ payment of their feu-duties for twa years, shall amit in time the feu
‘ of their lands, conform to the civil and canon laws, sicklike and in
‘ the same manner as gif ane clause irritant was specially engrossed
‘ and inserted in the infeftments of feu farm ‡.’ As the civil law allowed three years, Craig expresses his surprise that the statutory part of the act should be borrowed from that quarter, and yet the space be limited to two years. But we have heard that the English, long before that time, had limited the same forfeiture to two years; and the probability is, that the act only revived this particular of our own ancient law.

Neither the landlord nor the superior could, by their own authority, poind or distress their tenants and vassals for more than three terms immediately preceding. Balfour || quotes several decisions respecting this point about the year 1560. Craig gives no reason for it when he lays down the fact; but the common law had established

* Page 62.

† Page 204.

‡ Act 250. 15th Parl. James VI.

|| Page 398.



blished a rule in favours of country people, not presumed to be careful in the preservation of papers, that discharges for three consecutive years imported an acquittance of all bygones. In consequence of this presumption of the law in favour of the tenant and vassal, the landlord or superior was not allowed to poind for any more, by their own private authority, without the decree of a judge competent against the tenant, who might be by such discharges possessed of a good defence against the claim.

From what has been said, it is evident, that the distress of a vassal must be different, in material circumstances, from the distress or poinding of a tenant; and this difference must arise from the nature of the respective rights in their persons. In Scotland, with the body of the Roman law, we, in later times, admitted the distinctions between the contract of location and the emphyteusis. The tenant, by tack, had only a personal right to the possession; the entire radical property remained with the landlord; and therefore, in his favour, the hypothec upon the fruits came also to be received as law. The English never received the distinction; and, with them, all leases and grants to tenants were considered as estates in the land. The tenants in both countries were allowed to possess the total management of their moveable effects which were distressed and poinded, not as the property of the landlord, but as pledges for the tenant's performance. Feu-holdings are still admitted to bestow a right or estate in the land, according both to the Roman and English acceptance; and consequently, the distress of the feu or vassal must proceed upon English principles; and we are now to show, that it is, in fact, a remainder of the ancient distress, essentially the same with the poinding.

Our law, indeed, has bestowed upon it a different epithet: It is termed *poinding of the ground*; and the debt upon which it can only proceed, is known by the name of *debitum fundi*. The land is said to be the proper debtor, and not the vassal; but we are able to show

that this term has been bestowed upon it only in latter times, and that, even then, it did not relate to the seizure of the moveables, (properly called *poinding*), but related to the seizure of the ground itself.

The distress, if this deduction be true, must have proceeded without any relation to the Roman hypothec, and without any distinction between the fruits of the ground, the cattle, or other moveables. It could afford no personal action against the possessors of the feu, because it had no direct connection with them. No goods could be seized but such as were found upon the spot; nor could the master follow or bring back such as were there, if removed before the execution of his diligence. In short, the rules and limitations of the English distress must apply in every circumstance, unless it be in those particular articles of the moveables which the special customs of the English have excepted from the subject of the landlord's seizure.

Sir Thomas Craig, so far as we have been able to observe, is entirely silent upon the subject of hypothecs. He speaks only of distress in the manner we have heard. He wrote about the year 1600; and it is probable that, at that time, the doctrine respecting them was not understood or ascertained. Lord Stair only touches upon this subject, and, in doing so, has laid down a doctrine opposite to the principles which we have been endeavouring to establish. 'Superiorities (says he *) carry the right to the service and duty contained in the vassal's *reddendo*; and that not only personally against the vassal upon any personal obligation or contract of writ, but also upon intromission or meddling with the fruits or profits of the land; for all such intromitters may be pursued and distressed personally for the duties contained in the *reddendo*; which, being granted to masters of the ground, for their tack duty, against tenants, and all intromitters with the rents, is much more competent to the superior for his feu-duty, or other services in kind.' His

Lordship

Lordship appears, in this place, to have blended two things extremely different, and to have been misled by a very unjust analogy. He says, that the personal action against intromitters being granted to landlords for their tack-duty, it is much more competent to superiors. Has the superior a higher right in lands than the absolute proprietor? or, is a vassal, by infestment, lower than a tenant by lease? On the contrary, is it not certain that the superior has divided his right; he has given the property, or *dominium utile*, to another; and does not this right bestow upon the vassal the total and exclusive management of the produce of the land, and of his own moveables? and yet, according to this author, he has a less right than the lowest tenant. In the next place, the superior's claim lies to the lands themselves. In forfeiting the tenant, the law presumes him to obtain a great advantage; because a feu is always held, and actually is worth more than the feu-duty, by means of the improvements made upon it. To give an action against intromitters, therefore, would be unequitable; because the master, by his claim to the lands, is always certain of having his arrears refunded. In a tack, the land is supposed only to be worth the tack-duty and labour, and no more; and, if the master loses the fruits, he loses every thing; and the forfeiture of the tack is not presumed to bring him any advantage. Mackenzie, in the same manner, talking of the tacit hypothec, adds *, 'which tacit hypothec the superior has also for his 'feu-duty.' From him Mr Erskine has borrowed the same position. 'The superior (says he †) has also a hypothec on the fruits for his 'feu-duty, of the like general nature with that of the landlord; but, 'in a competition between the two, the superior's right prevails over 'the other; for, where a vassal lets his land to a tenant, it is to be 'understood, that it is with the burden of all feu-duties payable to 'the superior, whose right cannot be impaired by any fault of the 'vassal.' This last position is literally true. It is evident that the

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superior

* B. 2. T. 6.

† Page 279.

superior has a right of distress, preferable to every right below him; but we are to shew that he has not, or at least ought not, to have any right of hypothec. Our lawyers have, in the places quoted, blended together the right of the tenant by personal contract, with the right of the vassal by investiture. The English landlord has a constant title to distress the goods of his tenant; but he has no hypothec or action against third parties, further than what has been lately bestowed upon him by statute. We shall find the Scotch superior, of the feu-holding, to be exactly in the same predicament. To come at the ground of the matter, let us first consider the nature of this superiority. When a man lets land to a common tenant, he may poind the effects upon the ground for payment of his arrears. He may also poind the subtenants for what they are truly due at the time; but he has an exclusive right for no more than one year against the creditors of the tenant. When a man feus ground for a rent certain, what does he do but give it in perpetual lease? Why, then, should the law give this last lessor stronger and broader powers for the recovery of his rents, than to the other, who gives it for a limited time? But there is a distinction of more consequence, which practice has established. It allows the poinding of the ground to have effects denied to the landlord. The feuer has divided the property, and given away the *dominium utile* to the tenant. Is this division to give him a superiority over the absolute landholder, whose property is entire? Absurd and inconsistent as the matter may appear in this light, it is not the less true in fact. A superior, for his feuduty, has been entitled to poind the lands, *i. e.* to sweep away every thing he finds, without the least regard to the *quantum* of arrear, and without regard to the property of the goods found. If they were upon the land, it was enough for him; and this liberty we find to have been claimed and exercised by superiors for their dues; which, because they were real, affecting the ground, came to be termed *debita fundi*, debts of the land. But what are the *debita fundi* when analysed? nothing more than the arrears of the rent for which the
landa

lands were originally fet. Why, then, should the first lessors of land be allowed to treat their tenants with triple severity in the recovery of these original rents? A feu-duty is, properly speaking, no more a debt of the land than a common rent; for it is only a rent constituted by a charter and sasine in place of a tack. Now, let us suppose that the feuer possesses the ground in person, like a tenant, as hundreds do in fact; that he has feued the ground at an adequate rent; that the superior, or master, suffers several years arrears to run over, and, in the mean time, the feuer becomes bankrupt; is the negligent superior to be allowed to sweep away the whole moveable stocking upon the land, merely by taking out a writ, under the title of *letters of poinding the ground*, while the master upon a lease could only be preferable for a single years rent? yet so our Judges have hitherto determined; and so our systematic lawyers have positively expressed themselves. An absolute proprietor, then, who lets a farm in lease, has a much weaker and ineffectual interest in his own lands; even to the extent of the rent, than a superior who has divided his estate, and given away the *dominium utile* to another. The absurdity of this is evident from the position itself, and, therefore, must be an error on the premises. Let us try to discover it, by continuing our analysis. What is the solid distinction between a common rent reserved (as the English say) upon a lease, and the duty reserved upon a feu? or, why is the latter termed *debitum fundi* in the execution of poinding? This is resolved by the distinction we have all along been endeavouring to establish, viz. the difference between the infeftment and the lease, and the different interest which the tenants thereby acquire. In the latter, the tenant is not conceived to have any reality in him; he holds by a contract personal in its nature, and only endued with a forced and statutory reality. The former is supposed to get the real property, the *dominium utile*, vested in him, and, in short, to have become master of every thing, subject to the payment of the reserved rent alone. As the superior, then, as it were, retires from his property, leaving every thing in the possession and
management

management of the vassal, the arrears of the rent came to have the appearance of a debt due to him; and, as this debt continues real upon the land, by being reserved out of it, the land, not the person, is considered to be the debtor. The master in a lease, on the other hand, is held to be still in the natural possession, notwithstanding the lease. The ground is his own property. One part of a man's property cannot be debtor for any other part, and, therefore, his rent is not termed *debitum fundi*; and there is no other distinction between them, in the claim for arrears or execution for recovery. We shall, however, afterwards discover where the true distinction lies.

Having thus obtained a precise idea of a *debitum fundi*, so far as respects our present subject, let us try, in the same analytical method, to reach the nature of the distress or diligence which the law authorises for making it effectual. 'Poining of the ground (says Mr Erskine in his lesser Institute *) may be directed against all goods that can be found in the lands, even though the original debtor should be divested in favour of a singular successor.' Here is no distinction between the fruits of this or that year, or between the corn and the cattle, or the other moveables; all are affected by a poining of the ground. In short, there is no mixture of the Roman hypothec in this kind of seizure; and, when our writers tell us that superiors have a hypothec, they confessedly have founded their opinion upon the analogy of the rights of masters by common leases. The records of our Courts furnish us with innumerable instances of actions upon hypothecs, sustained to landlords: They do not exhibit a single instance where such actions upon hypothec were brought upon *debita fundi* against purchasers from vassals; nor do we believe that an action of that kind would have been sustained had it been attempted. By having a hypothec, then, they can only mean the right of seizure, which superiors have always been possessed of; the difference of which from the common hypothec is perfectly understood. Now, is it not plain that this species of seizure has a different foundation

* Page 418.

foundation from the other; and that this foundation is no other than the ancient right of distress, which the lords of the land exercised from the earliest ages all over Britain, for recovering their duties and services. The principle of this seizure was good and humane. The moveables were taken, first, in lieu of resuming the land itself, and next, in place of resuming the possession of the land, both which, we find, came to be judged severe and ruinous to the vassal. So long, indeed, as the vassal, or his successors, possessed the lands by themselves in person, this distress, or diligence, could neither be hurtful or unjust, as their real estate was thereby saved to themselves and to their posterity. Even when the vassal divided the land, by subinfeudation, among inferior feuers or vassals, still the distress by the superior, or the poining of the ground, was allowed in its full extent. These vassals had all estates in the land, their rights to which depended upon that of the mesne lord, or, as we say, the immediate superior. The distress, therefore, of the lord paramount, or prime superior, saved the property of all concerned from forfeiture.

In England, humanity, and public expedience, concurred in limiting this right in the hands of the lords. The common law discharged the sale of the goods so attached, and appointed them to be kept as pledges till the tenant relieved them. It refused the exercise of this power in any other place but upon the land itself; so that the lord could not follow or bring back the goods, unless they had been driven off before his eyes; nor would it allow him to open locks in order to take them out; neither could he take fixtures or growing corns, because they were *partes soli*; for that would have been a kind of resumption of the free-hold, which the distress was intended to prevent: So that the right of the lords weakened with time; and at last may be said to have sunk into a mere claim for rents and services, recoverable by distress alone. After the fall of the military tenures, the payments and services were too slight to incur the hazard of forfeiture of the lands, which, in England, went almost entirely out of practice; and the single remedy of distress was found

found sufficient to force the vassals or tenants to the performance of every part of their duty. While the immediate or inferior vassals were in the actual possession of the lands themselves, or, as the English say, *terre tenants* thereof, it was no wonder that the law justified the overlord or the superior's poining the ground, to their utmost extent, over all the lands and goods belonging to these vassals, or, in other words, over all the moveables locally upon the ground. No injustice was thereby done to any person; and the moveables were thus made the preservatives of the lands themselves. The only circumstance of inequality that could occur in this case was, that of a greater distress being taken from one subvassal than corresponded to his share; but still, as his lands were the most valuable property, an inconvenience of this kind made no figure, when compared to the advantage of preserving them from forfeiture, especially when he was entitled to recourse upon his brethren vassals for relief *pro rata*.

From this circumstance, we hope to be able to lay open one of the sources of that custom established among our ancestors, and which we now look back upon as an indelible mark of their barbarity; we mean the custom of poining the tenants for the debts of their lords. This practice was not peculiar to Scotland, but had been the law of the whole Island. The ancient chronicle of St Albans mentions a charge given by Henry III. to his Barons of Exchequer, in these words: 'Nullus rusticus distringatur pro debitis domini sui quamdiu dominus habuerit per quod distringi possit. Inquirendum est etiam qualiter magnates se gerunt versus homines suos; et si invenerint ipsos transgredientes, corrigant quatinus poterint.'—'From this (says the Honourable Daines Barrington *) it appears that the tenant was not only oppressed for his own debts, but likewise for those of his lord. The town of Aylesbury held lands by the service of keeping beasts distrained for the King; which shews that these distresses were very frequent, and therefore, probably, often
 'oppressive.

* Obs. on the Stat.

‘oppressive. The manor of Byher, in Northumberland, was granted to be held by the same tenure.’

The charge, upon this occasion, being given by the King to the Barons of Exchequer, proves that the debts of the Lords, here mentioned, were no other than the rents and duties due to the Crown out of their lands; for the non-payment of which both the lords and their vassals were liable to forfeiture. The royal distress was thus ordered to be directed against the moveables of the lord himself, in the first place; but, in case he had none, there was no remedy; it behoved to proceed against the goods of the vassals, as before.

As far back as the reign of Edward I. which began in the year 1272, a general practice had taken place of subdividing lands all over England. The vassals of the great lords subfeued, and sold their feus to others, to be held of themselves. The *terre tenants* at this period appear to have been vassals holding by livery and fine, and not tenants holding for terms of years upon leases. Had matters continued as they then were, subinfeudation would have gone downwards, and there would have been but little or no occasion for tenants by lease; but this method of dividing the lands occasioned the well known statute of Westminster to be passed, in the 15th year of Edward I. whereby it was enacted, ‘That, upon all sales or feoffments of land, the feoffees should hold the same, not of his immediate feofor, but of the chief lord of the fee, of whom such feofor held it himself.’ By this means, no other method was left in England of granting out lands to tenants, and at the same time retaining the property, but by leases, which required no livery of fine. It did not vest the radical property of the land in the lessee; it gave him an estate, not consisting of the land itself, but of the possession of it, or an interest in it; but this interest, not being an infeudation, was not against the statute *quia emptores*.

This circumstance occasioned an alteration in the matter of distress, but not so considerable as we might be apt to imagine. Though the

property was not conveyed by the lease, yet an estate was thereby vested in the lessee; and, in the recovery of the rents, the lessors conformed themselves to the same methods already in practice between overlords and vassals, and forced their lessees to pay their rents by distress. No other remedy was known; and, accordingly, the lessor and lessee were, in this matter, subjected to the very same rules with the feudal lord and vassal. In another circumstance there was a great difference between them; the vassal held for services, duties, and payments, which, in course of time, appeared as nothing in comparison of the value of the lands. The lessee, on the contrary, paid full rent for the lands, and was presumed to have nothing in return for them but the just produce of his own industry. To have subjected tenants of this kind for debts of their lessors, though due out of the land, would have been unreasonable and unjust, if these demands exceeded the rents contained in their lease. To have refused the power of distress to the overlords would have defeated their signorics: They therefore were allowed to distrain; but the tenant was allowed immediately to repledge the distress, upon payment of the sum due to the immediate lessor, in terms of his lease.

Although the statute *quia emptores* was borrowed by our Robert I. and passed in Scotland, yet certain it is that it did not continue long in observance. A perusal of the statute will satisfy every person, that the law, the practice, and the ideas of the Scottish and English, were at that period exactly the same. At what precise time this excellent statute came to be neglected by us is uncertain; but we find that subinfeudation went on at no great distance, with as much rapidity as the common feudal restrictions would admit. The several rents so created in the persons of the first, and descending superiors, were considered to be *debita fundi*, and allowed to be preferable to every person or thing below them. The circumstance of tenants being poinded for the debts of their lords was neither uncommon, nor carried in itself any thing unreasonable or unjust; for feus were only considered to be perpetual tacks, and the holders of them were
commonly

stowed by lease vanished out of sight. The lands appeared to be, notwithstanding the tacks, in the full natural possession of the proprietor, and consequently liable to attachment for his debts, especially for the *debita fundi*, or lord's debts, which affected even freeholders and feuers themselves.

Our lawyers did not reflect that the tenant by lease paid the full value of the lands under his labour; that he had no advantage but the produce of his personal industry, a return which he was entitled to from any lands upon which that labour should be bestowed. The moveables of tenants by lease in England were, no doubt, liable to distress for the claims of the lord paramount; but then the tenant had the power of immediately repledging them, upon payment of arrears due for his own term. The distress in Scotland, on the contrary, turned into actual execution, and the goods were seized upon or sold for payment of the demand, which must have brought irreparable ruin upon the tenant. By his stocking alone, he could expect to draw subsistence from the farm. If the one was taken from him, the other behoved to follow; whereas the vassal, though distressed, had an estate in the land remaining to him, cleared or rendered free by the distress itself. These reflections were not made; and tenants by lease lay exposed to distress for the whole *debita fundi*, or debts due to the superiors; which practice established into law; and this we take to have been one of the true sources of the poining of tacksmen for the debts of their lords.

As to poining for personal debts, we have shown in another place how it came also to fall upon the unhappy tenants. The debts due to the lords themselves, in their order, were the first known, and the creditors of these lords soon followed the example. The act of James II. secured the tenants in possession of their leases, and thereby put these leases above the Roman contract of location. The tenant thereby acquired a kind of emphyteutic right during his term; and soon thereafter another act passed, which protected these tenants from being poined for their lord's debts upon the brieve of distress.

distress. 'Till eschew (says the act) the great heirschip and destruction of the King's commons, maillers, and inhabitants of lordis landis, thro' the force of brief of distress *.'

Here we discover a capital distinction between the tenant by infestment and the tenant by lease. Both these lay open to distress for *debita fundi*; but, from this statute, it is plain, that vassals or tenants by infestment were not liable to be attached for the personal debts of their lords upon the brieve of distress. The reason was just the reverse of that which had subjected lessees. The vassal or feuer had an estate in the land; he had the *dominium utile* in himself; and was a free tenant after payment of his feu. Now, it is indisputably true, that this act related to poinding upon the brieve of distress alone, (*i. e.* to poinding for personal debts due to the lords), and not for *debita fundi*. Hence we shall find, that tenants still lie open, even at this moment, to have their whole effects carried off by poinding the ground, in the same manner as they were previous to the act 1469; at least, they have no protection but the mere analogy of that statute, which our Judges, moved by the broad iniquity of the case, have extended in their favour. They, in consequence, can now be poinded for no more than the arrears of rent, and the current term.

Upon the very same principles, the Judges ought to have applied a remedy to another absurd and iniquitous consequence which the law had annexed to the claim of the superior, or to the *debita fundi*, against even the tenant or vassal in feu-farm. While none are concerned but the superior and his vassal, we have shown that there is no injustice, no impropriety, in allowing the former to pay himself his whole arrears, by seizing the moveables upon the lands, in virtue of a poinding of the ground, as what he thus takes with one hand he gives with another. The vassal has his land property freed, which will soon enable him to procure a new stock of moveables: But, if the feuer is in debt to others, what right has the superior to seize upon the whole moveables, in
prejudice

* C. 36. 5th Parl. James II.

prejudice of the other creditors? The answer must be, He has not such a right. A superior is not, nor can be, held as possessing higher powers than an absolute proprietor; and his feu-duty cannot be upon a better footing than rent due by a tenant. The landlord has only a claim upon the moveables for one year's rent, and the poinding by the superior ought to go no further. It is competent to him at all times, and it is his own fault if he does not use it. A master loses his rent by a bankrupt tenant; but a superior's arrears continue to be *debita fundi*. He has, besides, the true and radical right of all superiors; he is entitled to recur upon the feuer's interest in the ground, in which he will be preferred to all the world. On the other hand, if the feu-duty be equal to the value of the lands, what reason can there be for allowing any man to repair his negligence by sweeping off the whole moveables of a tenant, in prejudice of his other creditors; for no other reason but because he lets his lands by a feu-contract, in place of a lease; because he takes the title of a *superior*, and calls his rent *debitum fundi*?

Having thus minutely considered the character and situation of the superior and vassal, together with the rent or feu-duty, in the simplest and plainest form, the ideas thus obtained will guide us with ease and pleasure through the remaining part of the subject, which otherwise must have appeared intricate and disagreeable, we mean, the *debita fundi* arising from securities created over land by proprietors in favours of their creditors: 'For (as Lord Kaimes says), the splitting of land property into many parts, though favourable to commerce, makes law intricate, and purchases insecure; but these inconveniencies are unavoidable in a commercial country *.'

It is what is called the *real lien* we are at present to consider, a phrase borrowed by our lawyers, and sometimes properly used for the infestment, reservation, or other method by which the burden upon the land is established; at other times, it is used.

* Tracts, p. 16.

used to express the burden itself, being synonymous to the *debitum fundi*. In whatever shape or form the real lien appears, it is nothing more than a different modification of the superior's right, which we have already explained, the essence of which is the power of re-entering to the land itself; in place whereof, the right of distressing or poining the moveables of the tenant was afterwards substituted; consequently, a man who was not superior, could not have a right to re-enter and take possession of that land, and could not have any right to the power substituted in its place, viz. the power of distress. Hence it happened in England, that, when a proprietor made a grant of a rent out of his lands to another man, such a grantee or renter could not pay himself by distress, because the granter remained in the full right. The granter was bound, and not his lands; and the rent was termed a *rent-seck* or dry-rent, because the owner had no right to distress or point the tenant for payment. It is evident, therefore, that the lien or reality of any burden or debt upon land, consists solely in this power of poining or distress. On the other hand, if a man sold his estate to another, to be held of himself, reserving a rent or annual sum, he thereby continues to be the lord, and consequently continues to have the power of distress for the rent reserved. This was termed a *rent-service*, answering exactly to our feu-duty. Since a man could not at the same time sell his lands, and retain the *dominium directum* to himself, he usually reserved a rent upon the sale, by which he lost the lien or hold upon the lands; or, in other words, he could not point or distress for that rent. The right of distress is only competent to the lord, being given in place of his power of re-entry or right by forfeiture; but lands could only be forfeited to the superior; and therefore the power of distress, which was substituted in place of that right, did not belong to him.

By this means proprietors were deprived of a very great convenience: They wished to sell their lands for payment of rent to themselves and their heirs, in the same manner as we in Scotland
give

give them out in feu ; but the statute prevented them from doing this with effect, *i. e.* of preserving the real lien or power of distress. This gave birth to the common security, termed *rent-charge*, whereby parties sold their lands to be held not of themselves, but of the capital lords of the fee ; reserving, at the same time, a rent to be paid annually *in futuro* ; and, in order to preserve the lien, they made a special agreement in the deed, that the seller or grantee should always, upon failure of payment, have a right to enter and distrain for the rent ; and, in general, possession or sasine of it was given by the tenants entering into payment. ‘ This power of distress (say the English writers) or rent-charge is good only by the express provision of parties, not by the general force of the law *.’ The inconveniencies attending the rent-seck remained so very late as the 4th of Geo. II. when they were remedied by a special statute, in these terms : ‘ Be it enacted, that from and after the 4th of June 1731, all persons shall and may have the like remedy by distress, and by impoining and selling the same, in cases of rent-seck and chief rents, which have been duly answered and paid for the space of three years, within the space of twenty years before the first day of this present session of Parliament, or shall be hereafter created, as in cases of rent reserved upon lease, any law or usage to the contrary notwithstanding †.’ By this statute, rents, or real debts of all kinds, are put exactly upon the same footing with the rents of an ordinary lease. By *chief rents*, are here meant rents due to the capital lord himself, or the superior, in contradistinction to rents of assises, which are fixed money-rents paid by copy-holders and other freeholders, and therefore said to be assised. All of these, from a variety of circumstances, unnecessary to be here mentioned, had also become tedious and difficult in the mode of recovery ; and therefore are, with the others, restored at once to their ancient original power of distress. These rents are the *debita fundi* in England ; and thus the position we have endeavoured to establish is completely demonstrated, viz. that,

in

* Sullivan, p. 110.

† Land. and ten. p. 173.

in regard to the mode of recovery, the superior, or the creditor upon land, has no stronger right, and ought to have no greater privilege than the proprietor has for a common and ordinary rent.

The same ideas applied to the practice of Scotland, will lead to the same conclusion. The English statute *Quia Emptores*, though transplanted into Scotland, fell into desuetude; and subinfeudations, in every shape, went on without controul: Money was borrowed upon improper wadsets: Jointures were given to wives: Annuities were created: And, last of all, rights of annualrent were constituted, and made real liens upon land. The Scots were allowed to split and burden their lands as they pleased, by means of infeftment: They were allowed to retain the right to their estates in their own hands, and to grant the rents or annuities to others, which they did by carving out (as Blackstone, with great propriety, terms it) estates in the persons of others, to be held of themselves, under the titles we have already mentioned; and, last of all, they found no difficulty in giving away the property of their estates entirely, and, at the same time, of reserving rents and payments to themselves, or of burdening their lands with sums of money and conditions *ad libitum*.

We are then, in the first place, to trace out the manner in which the lien or reality is kept up in these several securities. An annuity, an infeftment of annualrent, or any other rent or payment, is constituted by detaching it, as it were, into a smaller estate, separate from the lands themselves, the full right of which remains with the granter, under the burden of this novel right; or, in another view, it is an alienation of a certain part of the produce, retaining the right to the stock. When a part of the lands, correspondent to the annuity, is cut off, a wadset or mortgage is thereby created.

Nobody chose to part with the right of their lands; and the method of constituting these securities was, in general, by making the creditor or renter hold their estates of the granters their debtors, upon a precept given by them, by which the creditor or annuitant was,

and still is, usually ineffect. Now, let us examine the predicament in which the creditor is by this means placed. The proprietor or debtor becomes the superior of the annualrent, and the creditor becomes his vassal. The one gets a penny money as an acknowledgment of his *dominium directum*, and the other gets the annualrent itself, and therefore may be said to have the *dominium utile*, in the most solid acceptation. But from whence is this annualrent to be taken? From the produce or *dominium utile* of the lands, no doubt: But where lies the right of the annualrenter to the poinding or distress? The answer is, that the annualrenter is interjected between the proprietor and his lands, so far as relates to that annualrent. The immediate right of property, so far as the rent extends to, is in the annualrenter, who thereby becomes the immediate superior of the lands, and master of the tenants; and here lies the real lien, the right of distress, or poinding of the ground. It was, and still is, often optional to these annualrenters to pass by the granter, and to hold of the superior above him; in which event, the creditor holds his annualrent or annuity upon the same level as the debtor holds his estate, as both of them hold of the same superior. The creditor has the like right to the annualrent that the proprietor has to his estate: He has therefore, in that respect, an equal title to poind the ground, by virtue of the nature of the annualrent, which, by the grant of the debtor, is given of the first and readiest of the produce; and, as it is made to affect the whole lands, the right of poinding becomes preferable to that of the proprietor, who, like the English granter of a rent-charge, has subjected his property by the nature of his own agreement. The idea of separating the annualrent from the lands hinders very often the forms from being properly analysed and reduced to principles; but there is nothing difficult or discouraging in the matter. Suppose a proprietor wadsets a particular farm, of a determinate rent, to be held of himself, it is very plain that the wadsetter becomes the vassal in that farm, and has a direct right to poind the

becomes his debtor, in consequence of the infeftment. The arrears of past years are all equally *debita fundi*; and, if a distrefs equal to them could be found upon the lands, he would be entitled to take the whole in satisfaction of these arrears. If such distrefs be not to be found, he is entitled to seize upon the land itself, not in consequence of feudal principles, but in execution of that justice which the laws have established. When we said, that, if a distrefs equal to the arrears of the annualrent were to be found, the annualrenter would be entitled to take the whole, we said so upon the supposition that the whole effects did belong to the proprietor of the ground, the debtor in the annualrent, and that such proprietor had no creditors to claim a share; for, in that case, our former principles apply. As much as the annualrenter takes of the moveables, so far he relieves the lands; and the possessor cannot justly complain. Besides, by non-payment of the annualrents, he has personally received what did not belong to him; and therefore, upon that separate account, the annualrenter has a just title to carry off every thing he finds upon the ground. Just so the master in a common lease, if he allows his tenant to run years in arrear, may poind every thing he finds upon the farm for his payment. It is the creditors of the tenant, and not the tenant himself, that are entitled to object; and we apprehend that creditors are equally entitled to do so against superiors in poinding of the ground, as they are against landlords in common cases.

As infeftments came to be the visible lien upon all heritable property, every condition and burden therein expressed was held to continue, or be established, upon the land, which was the great effect of the Scotch infeftment. The Romans created debts upon real property by hypothecs; now, the definition of a hypothec is, a right imposed upon the property of another. The latter holds the possession, and the creditor the hypothec, which burdens or limits it. The French, with the Roman law, early admitted these hypothecs into their practice; and the Scotch would certainly have followed their example, had they not found the whole purposes of them more completely

disquisition will not appear to be thrown away ; for, besides the errors discovered in this branch of business, it has furnished us with more precise and correct ideas of superior and vassal, landlord and tenant, and the right of *debita fundi*, than we had formerly obtained.

If poining the ground upon an infeftment be, as we have endeavoured to show, much the same thing with poining upon a tack, and exactly the same with the English distress, then it is no more than an exercise of property ; and accordingly we find, that the superiors of old poined the feuers, and their vassals under them, indiscriminately for their dues ; and Craig (as often as he mentions the distress of the superior) tells us, that, by his own authority, he may point for the three last terms of his feu-duty, for his sasine, or for his non-entry duty ; and, in England, the method of recovery is at this moment the same, whether executed by superiors, heritable creditors, or ordinary landlords. It is all by the simple method of distress by their own authority, or an act of exercise of the properties respectively vested in them. In Scotland, although landlords might oppress their tenants, it became a service of difficulty and danger for third parties to pretend to exercise authority against master and tenant acting conjunctly, especially such a violent act as that of poining their ground. Superiors came to have vassals more powerful than themselves ; and, in many places of Scotland, the voice of the law was not heard ; where, of consequence, it became utterly impracticable for creditors by infeftment, and even for many superiors, to recover their rents or annualrents by their own private authority. In this situation superiors found themselves at a very early period. Balfour *, after stating the power of distress competent to superiors by private authority, proceeds in these words, taken from the *Regiam Majestatem* : ‘ And gif ony overlord is not of sufficient
‘ strength and power to distrenzie and justify his tenant for the ser-
‘ vice aught to him, the King or his justice shall help him there-
‘ anent,

* Page 126. c. 4.

' anent, and shall cause his tenant, without delay, do him all just
' service and right, used and wont, for the lands or tenement which
' he holds of his overlord.' In process of time, the King's aid became, in most cases, requisite, which was granted by letters suited to the nature of the case. At first, these letters passed of course, upon production of the complainer's infeftment*. These warrants import no more than that the poinder is to have, in virtue thereof, the aid of the King's officers to assist him in the execution of his poinding. Not one word is mentioned of poinding the ground, or of any other distinction between that and the poinding of a common heritor. We have the greatest reason to think that the style remained thus fixed till the time that the Judges extended the construction of the act of Parliament 1469 to poindings for *debita fundi*. We have only at present to remark, that a previous decree became necessary to serve as a warrant for the letters of poinding the ground, as it behoved the party judicially to show that he had a right to the aid of the diligence. The defenders were called, not that any thing might be done or given out against them, but only as proprietors or possessors of the land, to say whether or not they had any objections to the poinding of their ground to the extent of the writs due by them.

Our next business is to examine the construction and effect which our courts of law gave to this diligence, and the doctrine which our systematic lawyers have laid down concerning it. The statute 1. of Robert I. c. 7. provides, ' That na man shall tak ane distrefs or
' poind without his aune fee and heritage, for service aught to him
' furth of lands halden of him, nor sall tak any superfluous distrefs.' — ' The poinds and the distreffes quhilks are taken sall be retained,
' and remaine in the samne baronie quhere they are taken, or in
' such ane place pertaining to the poinder, gif he any hes, quhere
' sick poinds or distrefs may remain and be kepted.' — ' And gif he
' hes not ane place, they sall be kepted in the next adjacent baronie
' of

* Vide the style in No. 3. of the Appendix to the Law Tracts.

‘ of the famine scherriffdom, bot not in castilles or fortalicias.’—
 ‘ And gif any man is attaint and convict in the contraire, he sall be
 ‘ in ane great amerciament to the King, as it were of the breaking
 ‘ of the King’s statute and law.’

The poinding regulated by the statute is clearly not that at the suit of personal creditors, but at the instance of the superior. It is for service and duties owing to him torth of his lands; and hence we see, that the laws of England and Scotland, in the matter of distress, were at that period the same. The goods were not taken in execution and sold, but retained as pledges to force the vassal into performance of his duty. The point fixed by the statute is, that no poinding of this kind could be executed out of the bounds of the lands. This was also the rule in England, and it continues to be so at this day, excepting a few small alterations produced by the late statute; and it is now the rule with us in poinding of the ground.

The next point which we find decided, regards the power of the heritable creditor in the direction of his diligence. ‘ An annualrenter (says Balfour *) may poind, for the annuals aught unto him, ‘ any part of the lands subject and bound to the same annual; and ‘ gif there be divers annuallers upon ane tenement, they may all ‘ poind and distraine any part therefor for their annuals.’ This, in a great measure, is still the law; and the consequence results from the nature of *debita fundi*. If the land is in the natural possession, it matters little what part of it be poinded; and, if in the possession of tenantry, the thing cannot readily happen; because, as we shall afterwards find, no tenant is to be distressed for more than the arrears due by him at the time, and the current term.

Our Judges varied in a surprising manner about the construction of this diligence. Hope, in his Major Practicks, takes notice of a case † in which the Lords found, that ‘ the annualrenter might ‘ poind whatsoever goods were found in the lands, although the
 ‘ same

* Page 400.

† Paterfon against Adamson.

ven. The Lords dismissed the action, and found, ' That execution might proceed so long as that person lived at whose instance the sentence was obtained, albeit the heritor should die, or change from one person to another ; which alteration ought not to impede the said real execution, the obtainer thereof living, as said is *.' This decision appears to be right ; for a poining of the ground, properly speaking, is a diligence given in aid of the proprietor's right of paying himself ; and there is no personal conclusion against the defender, who is only called as having interest in the land affected. Decree, therefore, being once given, no other possessor is presumed to have any objection against it ; but no diligence can proceed in the name of a dead man ; and therefore it is that these decrees remain in force only during the lifetime of the person obtaining them.

The next case that occurred ; pointed to the settlement of two other circumstances material in this business. The rents of some lands being arrested in the hands of tenants, an annualreuter appeared with his infeftment, and craved to be preferred. The arrester answered, that a naked infeftment could give him no action against the tenants ; he could only point the ground, the right to do which remained entire. Neither had the claimant executed any diligence, or raised summons upon his infeftment ; so that the same, without any other diligence, cannot affect the arrester. The Lords accordingly preferred the arrester, seeing the annualreuter might, notwithstanding this sentence, point the ground, and the goods thereon. By this judgment, the ancient principle of the heritor poining for payment by his own authority, and the diligence which originally had been only obtained in aid of that authority, were rendered essential in the vindication of his right. Another principle seems to have been at this time adopted, derived from public expedience. All acts, by private authority, had long been discouraged by the law ; even barons and heritors who had jurisdiction, had been obliged to take decrees in their own courts before they could point their

* Ker against Hepburn, ult. June 1624.—Durie, p. 132.

their tenants ; and those who had not, were obliged to apply to the Judge Ordinary *. Since the *brevi manu* power was taken from heritors, it was right also to take it from superiors and heritable creditors, by fixing them to their proper diligence of poining the ground ; but we must observe, that the matter was not thereby put under sufficient regulations ; for a decree of this kind once obtained, may be executed at any time thereafter, without ascertaining the arrears due by the tenants, or the arrears due to themselves by their infestment. The only difference is, that the poining must be executed by a public warrant, and by the officers of the law ; so that this diligence still retained a great deal too much of its original rigour, viz. the power which all heritors anciently had, of recovering their rents by their own authority. So far this decision appears to be well founded ; but it was certainly wrong to prefer the arrester upon that account, as it was confining the effect of an heritable debt against the principle of its constitution. An English rent-charger has not an action against the tenants ; he has only the power of distress by consent of the proprietor ; but such a creditor has nothing of the property in him ; whereas a Scots annualrenter is, in effect, the master of the tenants, so far as the annualrents extend ; and therefore he ought to have been preferred.

In the same action, it was objected, that the tenants would be prejudged by the judgment given, and would be obliged to pay the arrester, and then have their goods poined by the heritable creditor : But the Lords found, ‘ That the tenants were *in tuto* to pay to the arrester, and that their goods could not be poined again by the annualrenter, who might poin his author’s goods, and comprize therefor, as the act proportions †.’

By this judgment, the Lords expressly extended the act of James III. to poinings of the ground ; although, from every word of that act, it is evident that the legislature had nothing in their eye

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* Tracts, p. 166.

† Gray against tenants, March 24. 1626.

but poinding by the brieve of distress, or what we now call *poinding for personal debts*. The poinding by superiors or heritable creditors had not been so common or so hurtful as to attract the notice of the legislature; or, what is probable, Parliament saw no distinction between these poindings, so far as respected the tenantry. It was equally contrary to justice and right reason, that any set of men should be liable to pay a debt twice over to creditors of any denomination; and it was ruinous to the police of the kingdom, that the most laborious part of the subjects should have lain open to inevitable destruction. The judgment of the Court of Session, therefore, in holding up this act of Parliament as a protection to the tenantry against the creditors of the lords, without distinction, stood supported by law, by justice, and by policy.

The Court, however, did not continue long in this opinion. A lady, infest in a jointure brought a poinding against the tenants of the ground, when the Lords were pleased to find, 'That the goods of the tenants were, in law, subject and liable to the payment of the annualrent of all years and terms preceding the poinding, notwithstanding that at that time they should be owing no duty to their master, even although the terms of their rents were not come; That it was enough if the terms of payment of the annualrent were past; and that, in that case, the annualrenter might point *omnia investa et illata* within the ground, as well any stranger's goods and gear as the goods of the tenants, labourers of the ground, to which payment the said tenants goods were subject, albeit their master's right should not extend to the half of that for which their goods were poinded *.' When the act of Parliament of James III. was resorted to by the unhappy defenders in this suit, it served only to make the Court go further wrong. They found, that the act extended only to poindings for moveable debts due by the master, and not to annualrents claimed by infestment, which affected the ground, and all the goods thereon. In this remarkable decision, it will

* Lady Ed. No. 11. July 1628.

will be observed, that the whole prejudices and errors respecting poindings of the ground are displayed in their proper colours. Lord Stair, in excuse of it, tells us, that the pursuit was rather declaratory, than for present possession or execution ; but that is no apology for declaring such injustice to be right. The sounding names of *superior*, *infestment*, and *debitum fundi*, swayed the judgment of the Court, without reflecting upon the real import of these terms. The Lords did what many people still do ; they personify the land, and fancy that it is truly and substantially debtor in heritable debts ; for which purpose, they suppose that the ground takes hold of every *item* upon its surface ; and that, after hold is thus taken, it has a right to apply them in payment of the debts due by itself. The mind seems afraid of looking into the mysteries of the *debita fundi* ; and therefore all the effects that can be thought of are attributed to them, right or wrong, just or unjust. An heritable debt, as we have demonstrated, gets only the name of *debitum fundi*, to distinguish it from a common rent. The one is due by the tenants to their master ; the other is due by the master himself to another master ; and the land is no more debtor to the one than it is to the other. We will afterwards clearly prove, that the term *debitum fundi* was not given to heritable debts upon account of their effects in poinding, but upon account of the separate right inherent in them to poind the lands themselves. The annual produce of land is the only thing in contest, and poinding is the means of appropriating it. The landlord may poind for his rent, and the heritable creditor may poind for his annualrent ; but both these poindings are the same to the tenant, and the same to the ground. The first will produce but one crop in the year, and the other can be obliged to pay no more than one rent.

The next decision corrected the error committed in the case of Gray, where action was refused to an annualrenter against the tenants. Sir John Hamilton pursued his own tenants for their farms. An annualrenter appeared, and demanded preference to the heritor, which :

which was allowed accordingly, and the farm appointed to be liquidated for that purpose *. This decision was perfectly consonant to principles. The annual renter was the master, so far as extended to his demand, which being payable out of the first and readiest of the produce, must have been preferable. Durie takes notice, that the creditor stood possessed of a decree of poinding against all concerned, and was entitled to recover by a personal action, to which all proprietors are entitled. When, therefore, superiors or heritable creditors insist in such penal actions, they are acting, in every respect, in the character of proprietors in possession; but, when they poind the ground, they return to their former situation, and are held to be out of possession. Now, an heritor can poind or sue his tenants, but he cannot bring a decree of poinding the ground against them, because no additional power over it can be given to him by any interposition of the law. This is illustrated by the next case which comes under our consideration.

A gentleman wadsetted his lands, and took a back-tack of them, according to the custom of these times, whereby he obliged himself to pay a yearly rent equivalent to the interest of the sum borrowed upon the wadset. By the form of this transaction, this person sold his lands, and became tacksmen to the purchaser, notwithstanding the purchaser, in fact, stood in quality of a creditor, possessed only of a redeemable right. Considering himself in that capacity, he brought an action for payment of the back-tack-duty, and added a conclusion for poinding the ground in time coming. This conclusion the Lords refused to allow; 'because the pursuer being interested in the property, could not ask his own ground to be poinded for any sum due to him out of the said lands †.'

From this it must be plain, that the only meaning of a poinding the ground is to supply the want of the real possession, which the superior has given away by his grant, and which the heritable creditor

* Durie, p. 462. Hamilton against tenant, July 15. 1629.

† Laird of Garthland *contra* Lord Jedburgh.—Spottiswood, p. 232.

ditor never obtained by his infeftment. When a landlord poidns his tenants, what is this but poiding the ground? He does not take any part of the ground; he takes the moveables alone; but it is not termed so, because the landlord is in actual possession; and it would be ridiculous to desire the aid of a diligence, which is only intended to supply that want. Supposing, however, that the tenants refused to be poided, and resisted the diligence of his baron officer, the master would apply for the aid of public authority to enforce his right. In what would such a process differ from a poiding of the ground? Is it not plain, then, that tenants ought not to be farther distressed by the creditors of a master out of possession, than they can be by the master himself, who needs not the assistance which the other is obliged to have recourse to. Hence it is, that no title upon which a man may enter into the natural possession of land, can be a foundation for the diligence of poiding the ground; and hence the holders of adjudications, liferent rights, wadsetters, and others of that class, cannot demand the ground to be poided: They must enter like other landlords; and, if the tenants will not pay them, the possessory action of mails and duties is the proper step to be taken.

Since a decree of poiding the ground affords a personal action against tenants or against heritors, it ought also to produce an action against third parties who forcibly prevent them from executing the diligence. Accordingly, the person who prevents or suspends becomes personally liable to the amount, whatever it is*.

The nature of the diligence under consideration, and the just effect of it, were at once ascertained and illustrated by a decision which soon followed. The Earl of Galloway purchased and possessed some lands affected with an annualrent right. The annualrenter brought a personal action against him for the arrears. The Earl pled, 'That a personal action ought not to be sustained against him who was not author in the pursuer's right; but that the most the pursuer
' can

* 14th November 1634, M'Naughton.—Spottiswood, p. 232.

‘ can obtain by the custom and practice of the country, is only execution against the ground and the tenants, it being a novelty to grant personal execution against a stranger.’ The Lords repelled the alledgeance, the pursuer proving ‘ that Lord Galloway introduced with the duties of the lands to the extent of the claim ; for the Lords held the defender to be no better than if naked tenants had been personally conveyed to pay the annualrent ; *quo casu*, they would have sustained the process ; and, with the like reasons, it was found that process ought to be sustained against the defenders ; and the Lords declared, that they would keep the decision in the like cases whensoever they should occur*. This decision places the heritable creditor and the heritor in their proper places. It considers the heritor as tenant to the other ; and so he is to all intents and purposes. The tenant labours the land, and raises the crop ; and the annualrenter has a right to part of the crop, which, if the tenant retains, he may either be poinded or pursued. If the heritor previously receives it from the tenant, what is he but another or middle tenant ? If either the heritor or tenant allows their moveables to be seized by the heritable creditor, what is that but a common poinding by an upper proprietor or superior for his rent ? In short, the more we consider this formidable diligence, the more simple it will appear in its principles and effect.

At the period we are talking of, the poinding the ground appears to have been the most terrible and relentless execution of the law : It ruined tenants, cut off all personal creditors, swept away every moveable from the ground, and afforded personal actions against all the possessors ; but now it begins to assume a softer appearance. The Court begins to look back to the principles of their first decisions, from which false reasoning and false analogy had prevailed with them to depart. Lord Kaimes, in abridging a judgment from Gosport, 14th July 1676, observes, ‘ That it points as if a tenant cannot be distressed for more than he is *de facto* due to his master
‘ at

* Guthrie against Earl Galloway, March 15. 1637.—Durie, p. 836.

‘ at the time of the poining *.’ About three years afterwards, the goods of an English merchant were carried from cellars in the Cannongate, which he had taken as a storehouse, in virtue of a poining of the ground. The merchant brought a *spuilzie*, and pled, ‘ That poining could only reach the goods of the inhabitants, and not the goods of others ; and that, by the act of James III. they could only be pointed for one term’s mail for their master’s debt.’ The Lords found, that the act of Parliament extended to tenements in burgh, and that the proper goods of the tenants only could be affected †. From this decision, it is inferred in the Dictionary, that our present practice has limited poining of the ground to the proper goods of the tenant ; and the point is alluded to as a fixed one by Mr Erskine ‡, for which he quotes the same decision. Though the rule be just and proper, it is hastily inferred. We have heard, that the law of England early protected all the goods in shops, and public merchandise, from every kind of distress ; but, in rural tenements, it did not except the cattle and moveables found upon the ground, which, if they were *levant* and *couchant*, were liable to the lord’s distress. The decision we have heard determines nothing to the contrary ; it relates to a burgal tenement ; to a cellar or shop taken for the purpose of keeping merchandise, and not to the stocking of a farm. The law of France is the same with regard to the superior ; but it makes a very sensible distinction between him and heritable creditors, which is worth attending to in several respects. The sixty-eighth article of the customs of Normandy declares, that ‘ the lord may seize for his rent all beasts pasturing upon the land, to whomsoever person such beasts may happen to belong.’—‘ This (says the commentator) is special to the superior, *penes quam directum remansit dominium*, to secure him in the readier payment of his rents. He who has a rent payable from the ground, (*i. e.* an annualreuter), is also, *alio respectu*, superior thereof ; but it is not

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‘ thought

* Dict. vol. 2. p. 96.

† Stair, Feb. 6. 1679. Collect.

‡ Page 642.

‘thought that he has any such privilege as that above mentioned,
 ‘which belongs only to the proper feudal lord *.’ This is a distinction which our Judges, in all probability, would admit in all events, was such a case coming to be tried.

Lord Stair seems not to have had a fixed opinion upon this point. In talking of the messenger’s duty, he says, in one place †, ‘that he
 ‘may take the oaths of the claimants, and pass by the same;’ but he adds, ‘and albeit it is not so clear by custom, whether the oath of
 ‘any party will exclude the poining in this real action, as it is clear
 ‘in personal decreets; yet, *in dubio sequendum quod tutius est*. The
 ‘English, indeed, upon these annualrents, which they call *charge*,
 ‘do indifferently point the goods upon the ground, to whomsoever
 ‘they belong, if they find them but lying upon the ground; but
 ‘then it is only competent upon the very term of payment, where-
 ‘by all that have goods on the ground, not belonging to the tenant,
 ‘may drive them off; but we have no such summary poining of the
 ‘ground, nor are our poinings restricted to any determinate time;
 ‘but, at any time where the annualrent is due, and the term of pay-
 ‘ment thereof come.’ We must here observe, that our writers, in charging the English distress with being summary, always forget that the goods are only taken as pledges, and lodged in the hands of the sheriff, before whom the tenant is entitled to repledge, and to have every exception heard against the seizure; whereas the poinings by our landlords, as now carried on, are equally summary in the seizure, and, what is a thousand times worse, in the actual execution; for the Scottish poining deprives the tenant of his property for ever. To return to Lord Stair, we find an opinion directly against what he has just said in another title. ‘But this (says his Lordship ‡,
 ‘meaning the oath of a stranger claiming the goods) will not be relevant against any execution upon a decret of poining the ground.
 ‘The person whose goods were in the tenant’s possession may recover the goods; for poining the ground has much more privilege
 ‘than

* Page 99.

† Page 636.

‡ Page 663..

‘ than poining on personal debts.’ Farther on, he seems to have altered again, and tells us *, ‘ that poining of the ground can extend no further than to the goods thereupon, in so far as they belong to the tenant and debtors.’ So that, as to actual practice and precedent, this point is still dubious, though we have no doubt that the Lords, when the case occurs, will fix it upon the equitable side.

When lands are affected with annualrenters, all of them may insist in poining the ground. Where this happens, Lord Stair tells us †, ‘ That a certain time after each term will be limited to the first annualrenter within which he may point the ground ; thereafter the second may proceed likewise for the remains of the rents unpaid by the first poining.’ And for this he quotes January 9. 1668, Lady Clarkington. We have examined the decision as reported by Lord Stair, but can find nothing of this kind in it ‡. An old lady insisted upon poining the ground upon her contract, in preference to a younger one, who said that she had been seven years in possession, and ought to be retained in it by a possessory judgment. The Lords found, that ‘ a *debitum fundi* is not excluded upon a posterior right, and that a posterior annualrenter hath not the benefit of a possessory judgment :’ So that we are unable to conceive under what authority the order here mentioned by Lord Stair can be established, unless the several annualrenters had been in competition before the Court. Accordingly, it appears that this can only be done in such competition. The matter is properly explained in a decision reported by his Lordship. ‘ The Lords (says he) use in competition to give so much time to the first annualrenter, and so to the rest after each term, at which they may only point ; and so they decerned the first annualrenter to point within twenty days of each term, and the second within the next twenty days ¶.’ Afterwards ‘ they allowed forty days to the first annualrenter, and so furth.’ This was a proper and merciful interposition. The Lords

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* Page 750. l. 24.

† Page 649.

‡ Vol. 1. p. 500.

¶ February 15. 1662, Lady Mouschall.

thus regulated and restricted the power of heritable creditors in favour (as Lord Stair assures us) of the poor labourers of the ground.

The act of Parliament 1669, c. 5. prohibited poining to proceed without a previous charge, 'but prejudice of the decreets of heritors in their own courts, and to superiors to use poining against their vassals for their feu-duties, as they might lawfully have done before.' We have shown, that heritors always allowed the fifteen days of law to run after their decrees, and that they ought to have continued the practice. Lord Stair justly conceives the poining by heritors, and poining by superiors, to be in this respect the very same diligence. The act of Parliament plainly holds them to be so; and therefore his Lordship tells us *, 'That a poining of the ground requires no prior charge of horning, because no person is decerned to pay, and so cannot be charged; yet it cannot proceed till fifteen days after the decree of poining the ground, which are the days of law within which parties may safely satisfy or procure suspension.' This may do very well in the case of the first heritors against whom the decret is obtained; but, as it may be executed against their successors, they may be liable to very great inconvenience; and, in this respect, the law plainly continues the original summary mode of distress, which Lord Stair himself disapproves of in the English practice.

Debita fundi, as we already explained, are created either to the granter or to third parties by reservation, as well as by the direct grants of annualrent. Accordingly, Lord Kilkerran †, in his decisions, gives it as a rule, 'That, where a disposition is granted, burdened with this or that particular debt, although the creditor in that debt has no infestment, yet the practice is for poining the ground to proceed upon such debts.' His Lordship alludes to no precedent for this rule; but, as we before observed from Lord Kaimes, poining the ground is the only diligence which the law affords for immediate recovery, and is therefore implied in these cases;

* Page 750.

† Page 405.

or extension he calls *the law*, he has only asserted the fact, in place of assigning the reason, which is a plain one. A poining of the ground is an exercise of property; it is a different person acting as landlord. Now, there is no doubt that the landlord himself can point his own tenant for the whole arrears due; therefore the very same power is competent to his creditors by infestment.

Where the lands are in the natural possession of the debtor, this practice cannot be found fault with, even although he be a singular successor. The seizure of the moveables is, in this case, presumed to be the most lenient remedy, by which the lands are discharged of their debt; and besides, a singular successor ought to be liable, because he has received out of the lands the revenue which was due to the heritable creditor. Of all our writers, Lord Bankton is the most explicit upon this head. ‘If the grounds (says that author *) affected with the annualrent, or other *debitum fundi*, are in the heritor’s natural possession, all the goods thereon may be poined or distrained for the bygones. The above statute gives only relief to tenants; but, in other respects, the brieve of distress, or letters of poining the ground, may be used to the utmost extent, according to the nature and effect of that diligence.’ His Lordship here considers the brieve of distress to be synonymous to letters of poining the ground, which is a mistake; for these writs were in themselves perfectly distinct, as we have sufficiently explained. His Lordship mentions, in a very slight manner, that an infestment of annualrent is likewise the ground of a personal action against intromitters with, or receivers of the rents. These words, however, are too loose and general; and we are not to understand by them, that the heritable creditor has any right of hypothec upon receivers or purchasers of the produce, as a landlord has. The former can only point the ground, or bring an action against those who uplifted the profits. Now, this action is not, like that of maills and duties, a constant title of possession for years to come;

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* Vol. 1. p. 649.

ters with the rents in the mean time. We have given our reasons at large for thinking that superiors are not entitled to actions of that kind; and that opinion is fortified by the glaring incongruity of even supposing such a right to be inherent in heritable creditors. If, indeed, the poinding of the ground shall be prevented, by any person or persons, from executing his diligence, or if the effects which he might have seized be carried off to disappoint him, all concerned, as receivers or intromitters, must be liable in a personal action to the heritable creditor, upon the old principle, that, wherever the law acknowledges a right, it must also afford means to make that right effectual.

In all the cases where personal actions were allowed to heritable creditors, these creditors were prepared with decrees, and letters of poinding the ground; but, by a late decision, the Court dispensed with these executorials, and preferred an heritable annuitant to all arrestments of the rents in a competition between them *. Lord Kilkerran, in reporting this decision, adds the following observation: 'Of old, annualrents had no effect but by poinding of the ground; but now, since March 1637, Guthrie, they have been found sufficient titles against all intromitters personally.' Here the Court made a step backward to the principle of the *debitum fundi*. Originally, it needed no aid to give it effect either really or personally: It lost for a long time this privilege; and the decision has restored it, so far as regards the personal action. The production of an infeftment, and its warrant, is now sufficient to prefer the heritable creditor in all competitions for the rents of the lands affected, without decree, or letters of poinding the ground. The alteration introduced by this decision stands clearly upon right principles; for, when the produce is converted into money, the annuitant does not take it upon his decree, or letters of poinding, but upon the right of property vested in him by his infeftment. When an heritable creditor appears in a competition, he acts, and is received, exactly as the heritor would have

* Kilkerran.—Erskine against Arresters.

have been entitled to do. Now, an heritor, in a competition with the creditors of his tenant, would not be preferred for more than his hypothec covered, *i. e.* one years rent. Since the heritable creditor is here only acting in the right of the heritor, he clearly appears to have neither in law, justice, or common sense, a title broader than that of his author.

The result, then, of our argument is,

1mo, That superiors in feus ought not to have any preference over the moveables of the tenant in feu-farm, by poinding or otherwise, more than for the current term, in the same manner as landlords have over tenants by lease.

2do, That, in poinding the tenants of their vassals, the superior, or heritable creditor, should be entitled to carry their diligence no further against the moveables of those tenants than their immediate landlords would have been, *i. e.* for a year's rent. The remainder, in both cases, should belong to the creditors of such tenants in general.

3tio, The rule, then, would be, that a superior should be permitted to poind the tenants of his feu-holder, preferably to all the world, for his arrears, so far as these arrears amounted to one year's rent payable by the tenant. This might, in some cases, discharge several years of bygone duty. In the same manner, the annualrenter might poind his debtor, if in the natural possession, for one year only of such annualrent; for here the parties are nothing more than master and tenant. But, if the land be under tenantry below the debtor, the superior or creditor should be entitled to a preference for their arrears, only to the extent of the year's rent due by the tenants, in any question with their creditors. In short, this business ought to be regulated by the same rule which exists between a common landlord and his principal and subtenants, under the exception of the hypothec. The principle upon which this has been pretended to be established, is a plain one. If a man gives out his lands in feu at the full value, he is exactly in the situation of a landlord who lets

his land at a full rent, and ought to suffer for his own negligence, in allowing arrears to run up without any fund to discharge them. If the feu be let below its value, or improved, or purchased by an original price, the arrears run up against that value, or, properly speaking, they are *debita fundi*, and the superior has the original claim of all overlords, viz. the right of re-entry to the lands themselves for his indemnification. The heritable creditor has the same right. If he trusts his money upon a subject which is worth no more than the principal of the debt lent, he ought not to have allowed his annualrents to run in arrear. If the subject be worth both principal and interest, he will certainly be reimbursed from that quarter, and ought not to be allowed to appropriate the whole moveables of his party, which, in that case, is the only fund for the payment of the personal creditors.

Let us now attend to what the law has, *de facto*, established in this case. It will be best understood by pointing out the circumstances in which poining of the ground differs, in practice, from poining on personal debts. *1mo*, A decree, and letters for poining the ground, being once obtained, the superior or creditor may point the possessors of the lands, whoever they are; nor will any new decree be necessary during the life of the obtainer. *2do*, When the heritor of the land affected by the heritable debt is in the natural possession of it, the poining proceeds for the whole arrears, without limitation; nor is there any difference in the form or effect from the poining in a personal debt, or the poining of tenants by an heritor. *3tio*, If the ground be possessed by tenants, the poining may go the length of the whole arrears due to their master, including also the current term. In this the heritable creditor has the advantage of the landlord, who, by his own decree, cannot point till his rent becomes due in terms of the lease. *4to*, The pointer of the ground is preferable, upon the tenant's lands, to all the proprietor's other creditors; and, what is more extraordinary, to all the other creditors of the tenants pointed. These are the peculiarities which
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strefs; and that the poining of the ground is only a modification of that power. His Lordship, indeed, derives this power from the supposed original slavery of the tenant. On the contrary, we have endeavoured to derive it from the liberty of the tenant, and to shew, that the distrefs was nothing but a substitution for the lord's re-entry into the feu, which none but freemen could possess. We are agreed, however, that poining of the ground is only a modification of the original right, 'Poining (says his Lordship *) for payment of debt secured upon land is an exertion of the right of property. The effects are poined and distrained by the landlord's order or warrant; and execution can reach no effects but what are understood to be his property.' His Lordship, however, draws different consequences from this. He does not take notice of any injustice or inequality in this diligence, as established in our practice. But, with the utmost deference, we think it may be fairly asked, how a landlord can give an order to another to do what he has not a right to do himself? or why a severer or more comprehensive diligence should proceed, by dividing or delegating his power to another, than he himself can execute in person?

'A decree of poining the ground (says his Lordship †), if it can be called a decree, is, in effect, a judicial notification merely to the landlord and his tenants, that the creditor is to proceed to execution. In a word, the singular nature of this decree proves it to be an apish imitation of a decree for payment of debt, without which, as observed before, poining for personal debt cannot proceed.' We formerly declared our opinion, that this form arose not by any deliberate imitation, but from absolute necessity; and, when applied for, the contrivance deviated, as little as could be, from the nature of the thing. In many cases of old, parties who had rights fully in them were obliged to bring actions, concluding that warrants proper to their case should be issued out. The superior or creditor, in a poining of the ground, applied for the aid of the law in support of his
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* P. 169.

† P. 166.

'bearing, that the cattle of poor men, inhabitants of the ground, shall not be poinded for the landlord's debts, where the mail extends not to the avail thereof; and, though the act seemeth correcting of an evil custom to poind the tenants for the master's personal debt, yet the same reasons, equity and favour of their rusticity, justify the extension of it to their *debita fundi*; and it was so restricted.' He cites as his authority the decision, Lady Pitfoddil, in the year 1674.

Lord Kaimes is of opinion that our ancestors committed a great error in deserting the English security of rent-charge, and preferring that of the annualrent right. We had formerly occasion to defend this conduct of our forefathers, and to point out many circumstances in which the latter possessed superiority over the former. The history of poinding the ground furnishes an additional and decisive argument in favour of our constitution of heritable securities, or *debita fundi*. The English were forced, against their will, to quit this mode of subinfeudation by the statute *quia emptores*, and to devise the mode of rent-charge in place of it, in consequence of which, many old rents in England have been lost. The same thing happened in Scotland, for which we formerly mentioned the case of the town of Edinburgh, who have lost a considerable revenue of this kind, bestowed upon them by our Princes; and it required an act of Parliament, in our days, to save the remainder of these debts in England, and restore them to the simple power of distress, which is the only right they yet enjoy. Nothing of this kind happened in our real securities. Being constituted by subinfeudation, the connection between the parties was all along kept in its original vigour. Our heritable creditors thereby retained in their persons the right of the land, or, as we say, the superiority; and, consequently, they kept the right of distress, or poinding, and the right of seizing, or re-entry, upon the land itself, for these arrears. Accordingly, they never stood in need of an act of Parliament to restore or amend the nature or privileges of their original rights.

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In these matters we have in all probability been directed by the usages of France. Feu-duties and burdens upon heritage are there termed *charges foncieres*, or charges upon the ground. We shall give the definition of them by Monsieur Boucher D'Argis, one of the most celebrated French writers and lawyers of the present age. '*Charges foncieres* are the principal revenues of heritages imposed upon them by the proprietors at the time of their alienation, to be paid or delivered by the possessors of these heritages either in money or in grain.'—'Although feu-duties are of the nature of *rente fonciere*; nevertheless, in practice, when mention is made of *rentes foncieres*, without any other qualification, the revenues imposed after the feu-duty are only to be understood. No *charges foncieres*, not even feu-duties, can be created but by tradition of the ground, in consequence of donation, sale, or other mode of alienation. From this rule there is no exception but that of servitudes, which may be established by simple convention without tradition of the ground, which was introduced on account of the frequent necessity which people found themselves in, of imposing servitudes upon one heritage in favour of another.'—'These *charges foncieres*, once established, are so strong, that they forever follow the land, into whatever hands it may go.'—'The action for the recovery of these charges is principally real, and considered as a kind of vindication of the subject. They produce notwithstanding a personal action against the possessor of the heritage, for payment of the arrears fallen due during the time of his possession.'—'There is a difference between the *charges foncieres* and simple hypothecs in this, That the hypothec is only an accessory obligation created for the greater security of personal obligation, which is the principal; whereas the *charges foncieres* are principally due by the heritage and its possessor, who is only bound in respect of his possession of that heritage *.'

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* Grand Ency. v. *Charges foncieres*.

It would be difficult for any of our lawyers to express themselves more correctly upon the subject of heritable securities. Indeed, this account is so correct, that it suggests a case which has not yet occurred in our practice, but which, from the present mode of feuing, may be expected to occur. The French writer says, that the possessor of the heritage is only liable to a personal action for arrears of the heritable security for the time of his possession. In the foregoing disquisition, it has been stated as a general rule, that the tenant in feu-farm is liable for the whole arrears, because his land would thereby be discharged. But, if an heir or singular successor succeeded to a property which was not worth these arrears, we apprehend the French rule would take place with us, and such heir or singular successor would be only liable to the amount of his intromission. Accordingly, in the case of Lord Galloway, before quoted, the proprietor possessing was considered as a naked tenant, and could consequently be subjected no further than during the time of his possession.

The most ancient form of letters of poining the ground that we can have recourse to is that given by Lord Kaimes, which have been already mentioned. This form discovers the true origin of letters of poining the ground: They were given in aid of parties who were not able to vindicate their own rights. The lady who obtained these letters had the lands in liferent; and it does not appear that the diligence is warranted by any previous decree; but she seems to have produced her infestment with her bill to the Lords; for the warrant is granted '*Ex deliberatione Dominorum concilii*;' and the messengers are ordered 'to pass, concur, fortify, and assist the said Katharine and her officers in the poining of the tenants.' This shows that the lady and her officers might have pointed by their own authority, if they had thought themselves able to do so. The tenants are mentioned in general, which is full proof that no decree preceded the letters, otherwise they would have been directed against the particular defenders in that decree. They are also to take effect yearly in time coming, which shows that there would be no occasion
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for any further letters during the life of the liferentrix, who was to be *fortified* and *assisted* in poining the present and future possessors of her land, whoever they might be. This ancient form agrees, in every circumstance, with the theory we have been endeavouring to lay down.

The simplicity of this style afterwards went out of fashion. Before a party could be entitled to the King's assistance in poining ground in the natural possession of another, it behoved him to show that he had a right to do so. The various and involved transactions into which heritable securities were introduced, rendered it necessary that this precaution should be taken. The only method of doing this must have been to bring an action before the Court of Session, or Judge Ordinary, in which the heritors and the tenants of the grounds were called, not that any thing might be decreed personally against them, but that it might be known whether they had or had not objections against the pursuer's poining their ground.

'Execution upon a *debitum fundi* (says Lord Kaimes) is much further extended than formerly. Of old, execution was directed against the moveables only that were found upon the land ; but, by our later practice, it is directed both against the moveables and against the land itself, in their order. It appears probable that this novelty has been introduced in imitation of execution for payment of personal debt, though there is no analogy betwixt them *.' His Lordship has here struck out the true origin of the term *poining the ground*. Anciently, the heritable creditor only demanded letters to assist him in poining the moveables, which had no title to the epithet of *poining the ground*, more than any common poining at the instance of an heritor, or at the instance of a personal creditor. The moveables were the only object of seizure in all cases whatever ; but, in process of time, when the act 1469 came to be extended to heritable debts, the creditor (besides a warrant for poining moveables) obtained and added a warrant for poining and ap-
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* Tracts, p. 167.

prising the ground of the land itself for payment of his arrears, which were preferable to all other debts upon the land itself, and thence obtained the title of *debita fundi*. Personal creditors added the conclusion against the land to their hornings; or, when they seriously meant to proceed in real diligence, they took out letters of apprising. To distinguish the diligence at the instance of superiors and heritable creditors, it was termed *poining of the ground*. This practice was established before Dallas of St Martin's time; and accordingly we find the style of the summons of poining the ground, as given by him, altered accordingly *. In this form the liferent title is first libelled on, and the description of the lands particularly inserted from the sasine; after which, it subsumes or states the necessity of the action.

The names of the tenants must be particularly inserted in the summons, and, if possible, the several rents payable by them, together with the arrears in their hands. The reason is given by Lord Stair. 'If the pursuer (says his Lordship †) does not specially libel the rent, when he comes to poind he cannot make the rent, as he will then alledge; but the oath of the tenant must rule the same, though he should depone upon a tack, and doth not produce it, because poining of the ground doth not require an antecedent charge, as poining upon personal debts doth; so that the tenant cannot be presumed to have always his tack about him; and therefore it is safest, in poining of the ground, to libel and prove the rent, if the pursuer intend to insist upon the moveables of the ground.' The subsumption, even in this summons, still partakes of the original idea upon which the diligence is founded. The defender is said to be unwilling either to pay or suffer the pursuer to poind, which is a direct declaration, that, if they would have suffered him to poind, he might legally proceed on his own authority. If this be the case, the decree and letters of poining the ground are not essential forms in the business; they are only legal aids, which may be taken or not; and yet,

* Wide the style in Dallas, p. 197.

† Page 636. sect. 17.

yet, by the decision Gray against tenants above quoted, the Court seemed to consider them essential and necessary; and, by the practice of near two centuries, they are certainly now become so. Superiors and heritable creditors have thus lost their ancient right of poin ding *brevi manu*; and therefore an action of poin ding the ground is in every case requisite. The heritor is in this summons only called for his interest, as it is the lands that the creditor has solely to do with. Both he and his tenants are called only to hear and see the letters directed, or to show a reason why they should not; and nothing is concluded personally against them. The style is entirely altered from that of the reign of James VI. The King's officers, by the latter, were only to fortify and assist the pointer; but, at this period, pointers of the ground seem to have renounced every idea of acting by their own authority, and the business is committed entirely to the officers of the law. This material change was a consequence of the extension of the act 1469. Real creditors might have pointed the moveables by their own authority; but they could not point or apprise the lands; and, as all decrees at this time concluded for this apprising, the whole business came to be necessarily committed to the King's officers.

This action is by our systematic writers classed among the real petitory actions. It is considered to be *real*, because it regards heritable property; and it is called *petitory*, because the right is held to be established in the person of the pursuer; and the claim against the defender is, that he should permit that right to be executed*. But, when the true origin or intendment is looked into, it is truly nothing more, so far as regards the pointing of the moveables, than a diligence given in aid of the party, in the same manner as letters of ejection or possession are given to vindicate the right of proprietors; and, so far as regards the pointing of the ground itself, it is a real diligence to enable the creditor to recover his money from such land.

* Stair, p. 585.

Mr Dallas gives another form at the instance of a liferentrix whose annuity was payable in victual, which goes further than the former one. The liferentrix complains that the possessors not only refuse to allow her to poind, but they carry off the corn immediately after, to prevent and defraud her; and therefore she concludes not only for poinding the ground, but also personally for the value against the abstractors. This is one of the cases which produces a personal action to the heritable creditor; and, unless it was admitted, the right of poinding might, at all times, be rendered ineffectual. The summons, however, appears to go too far: It concludes for a warrant to poind the corns wherever they can be found, which, in our humble apprehension, is not a relevant conclusion, even though the annuity be in victual; for there is no allocation of the growth of any particular part. The whole produce is equally liable to be poinded; and that poinding can, by the nature of the right, extend no further than the ground of the lands. As the annuity is in victual, the pursuer thinks herself only entitled to poind the ground for corn, and she is right; but, in case of abstraction or defect, she concludes first for liquidating, and then for letters to poind the other moveables on the ground, thus keeping closely to the real nature of her right. Last of all, she concludes personally against the defenders, as unjust abstractors of the corn, for payment. This summons points out a great many inconveniencies attending these annuities in victual; for it is evident, that a person in the situation of this pursuer would require a new process upon every fraud or abstraction committed against her.

Stair gives us a form of letters of poinding of the ground at the instance of the superior for the duties in his *reddendo*. There is no title narrated, because it is a known action, requiring only the right of the pursuer to be mentioned, without being deduced; but the rights of heritable creditors are various and circumstantial, as are the instances we have heard from St Martin. He has therefore properly deduced the point of right, in the first place, and included it with
the

as the decree, as to them, might be restricted accordingly. If therefore we happen, from necessity, to be concerned in such a disagreeable diligence, all that can be done is to soften the matter for the poor people by any safe method that can be devised. In the remainder of the poinding there is nothing to difference it from ordinary cases.

ACTIONS of poinding the ground are competent, and, from convenience, are frequently brought before the Sheriff, to whom the brieve of distress was originally directed, and to whom the execution of the act 1469 is committed. The purpose is to force the regular payment of annualrents to heritable creditors secured upon houses or small properties; and they certainly are attended with that effect; for, when an heritor knows that this terrible diligence is taken out against him and his tenants, it is natural for him to dread the consequences.

Lord Stair tells us, that the days of law were necessary, even in decrees of poinding the ground. Later writers deny this; but, upon a former occasion, we ventured to say that the last opinion is erroneous. In this case it is the more erroneous, because the diligence of poinding the ground is now on all hands admitted to be founded upon the act 1469; and that act specially appoints fifteen days allowance to be made to all debtors before any poinding can proceed against them in virtue thereof; and therefore, we hold it to be a general rule, that fifteen days should expire before execution even of a decree of poinding the ground.

We have heard in what manner this diligence used to be extended against all the goods on the ground, although belonging to strangers; but, from what has been said, it is plain that the messenger must conduct himself by the same rules in a poinding of the ground as he does in an ordinary case. Of late years, many lands have been given out in feu at their full value; and other properties are incumbered by heritable debts, the principal sums of which are equal to the value. Hence it has several times happened, that a creditor by infestment seizes the whole moveables of the possessor by a poinding
of

Tacks.

THE first act of property most usual upon the acquisition of land, is that of giving it in lease, or, as we say, in tack, to tenants for a term of years. This practice must, in the nature of things, appear among the early effects of civilization; but it appears in very different shapes; different as the people themselves, their situation, and their manners. So soon as the property or land becomes very unequal, those who have more than they can manage by themselves, or their servants, must necessarily give it out to those who have too little for a certain share of the produce; and thus a kind of equality at least in point of subsistence, is restored.

To the Romans this practice became familiar, under the title of a *contract of location*; which, indeed, comprehended all engagements whereby things were let or hired by one man to another, and, in particular, the hiring of lands to farm. The contract of location was also ranked among those which are perfected by the bare consent of parties, in the same manner as the contract of sale, and produced the action *locati et conducti*; the one at the instance of the proprietor, for enforcing payment of the stipulated rent either in money or produce, and performance of certain duties incident to the business; the other at the instance of the *conductor*, to be maintained in the peaceable possession of the subject, and for having it kept in repair, capable of answering the purposes intended. It was also, *bona fide*, executed between freemen; but, though the Roman contract bears a near resemblance

semblance to our modern tack, we must seek the origin and principle of that deed in a different quarter.

Among the Romans, slavery subsisted in all its shapes, and in its utmost rigor: The lands of the rich were often entirely cultivated by slaves; and by the same men whom we moderns are apt to term *unhappy*, the whole domestic labours were performed. In many circumstances, little difference was made between them and the cattle. Such as were dedicated to rural labours, unconnected and unknown to their master, became *adscripti glebae*, fixed to the land, a part of the stock, and transmissible by sale and succession with the land itself. The domestic slave, having daily access to the person of his master, had opportunities of obliging him, and of being rewarded with his liberty; and hence arose the middle race of freedmen. The rural slave had not a chance of this; he was known, like the ox or horse, only by the corn, wine, or oil, returned from the land. However harsh it may sound, slavery was, without doubt, necessary and beneficial in the old world, to check the ferocity of mankind in war, and save the lives of their species for their own benefit. These men made slaves were obliged to labour for their own and their master's subsistence; and without force no set of men will do that for another. In countries where commerce and manufactories exist to employ the lower classes, their persons may be entirely free, because their own wants oblige them to work, and they are paid for their labour by the possessors of the land, who stand as much in need of manufactures as the tradesman does of them, whereby all are maintained by mutual industry; but, among many of the ancient nations, little intercourse of that kind took place. Rich men only had food to give; and personal services were the only returns which their poor could make them. The freemen, therefore, maintained themselves by the labour of their slaves, of whom war afforded a constant recruit; and luxury at last established itself upon the same foundation. Time riveted these habits; and, in some measure, they survived the fall of the empire, and its other manners.

The northern nations treated their slaves with more lenity. The Germans were all foldiers for ages, and did not admit an idea of private property in land, which belonged to the nation, and was cultivated by the whole body in turns, the portions of individuals annually changing according to their number, and sometimes their estimation. In such a state of simplicity, inequalities in rank, so conspicuous in other nations enriched by war or commerce, did not appear. Gaming, we are assured by Tacitus, principally turned the wheel of private fortune. To such a height of violence did this rage impel them, that, when all was gone, their liberties were often staked upon the last throw. Men, thus acting from principle, could not be treated with inhumanity; and the change was not so strongly marked as among their neighbours. Freemen reduced by debts must have been treated with lenity, and that lenity and habit of indulgence naturally extended to slaves reduced by war. Several passages of Tacitus concur in proving, that the Germans had inclosures round their huts in the age of his description; and it is conjectured by writers upon the subject, that their inclosures gave the first idea of appropriation, and that the grounds contained in them were laboured by their slaves, the situation of whom is thus elegantly described: ‘*Caeteris servis non in nostrum morem descriptis per familiam ministeriis utuntur, suam quisque sedem suos penates regit. Frumenti modum dominus aut pecoris aut vestis ut colono injungit, et servus hactenus paret.*’

The same manners followed these people into all the regions of their extensive conquests. The German slave deserting his country, became a fellow foldier to his master, and doubtless acquired his freedom. Success brought the slaves of the conquered, and the conquered themselves, under dominion of the adventurers, and the necessity of subjecting their own countrymen no longer existed. But, even after the settlement of these nations in their new dominions, when the property of land, in place of being national, vested in individuals, and descended to their heirs, still we find as much of their
primitive

This division of lands occasioned a distinction of persons, or, if the term may be applied so low, of ranks among the labourers of the soil. Of these the lowest were the slaves forming a very numerous class; for by them the whole inlands or domains belonging to the freemen proprietors were cultivated. They were termed *villains* and *bondsmen regardant*, *i. e.* belonging to the manor, and followed the land itself, as a part of the stock, into whatever hands it came either by alienation or descent. The next in order were such as cultivated part of the outlands for their own account, rendering to the lord or thane, like the ancient German servants, a certain quantity of corn and provisions, the produce of the land; and such were denominated *Georls*. The remainder was cultivated by superior tenants, who, as already mentioned, paid personal service and attendance on their lord.

The degrees of this slavery certainly differed according to the particular occupation of the individual. Those who dwelt in villages, and cultivated the lands or domains, were, in general, called *villani*. ‘Villains (says Spelman*) and their progeny, their lands and goods, might have been seized, and justice measured to them, after the use of the manor whereto they were regardant, (*i. e.* to which they belonged); for they were called *villani*, because they belonged *ad villam domini*, that is, to the town or manor of their lord. Others were *bondi*, or bondsmen simply, as neither in blood, nor belonging to any manor, as such as sold themselves into bondage, or were condemned to it by course of law. The third sort was the offspring of both these, who, because they were *nati ad servitutem*, were called *nativi*; so that a man may be bond, yet neither *nativus* nor *villanus*; and he might be *bondus* and *nativus*, yet not *villanus* or *bondus*; and *villanus*, yet not *nativus*; and might also be all the three, as commonly they were, *bondi*, *nativi*, and *villani*.’

Not only the cultivation of the earth, but a great part of the mechanic work then in use, was, among the Saxons, performed by
slaves

* Rel. p. 250. 251.

slaves trained up to the business; and, though the clergy, in general, favoured the mitigation of this servitude, and set an example, liberating them upon many occasions themselves, yet there is good historic evidence, that, in the tenth century, towards the close of the Saxon government, a great part of the common people were absolute slaves. With them it happened as among the Romans; the liberty fell first to the lot of the household personal or mechanic slave. The labourers of the ground were less thought of; their condition was more equal, and their services less regarded; and hence their servitude continued long without alteration.

The ceorls, who, no doubt, were partly composed of freedmen and the successors of the common soldiers composing the armies of the Saxon invaders, formed a numerous and respectable body. Their persons and their occupations were entirely in their own power; and, as they generally chose to apply to agriculture, a ceorl was almost another name for a husbandman or farmer. The rent or return paid by these ceorls was by the Saxons termed *feorm*, a word signifying meat or provisions, and which has been since applied to land itself, and its cultivators. It appears that this rent or *feorm* was limited in quantity by several laws of the Saxon Princes, in order to check the oppression of proprietors. These fixed rents formed an independence to the ceorls and possessors of the land, to which they, as freemen, had a title. The same class of men were capable of acquiring property, and rising in the state, in which many of them proved successful. They acquired slaves; and it is certain, that the manual and hard labour was in these times chiefly performed by people in that unhappy situation.

The conquest of England by William Duke of Normandy depressed a great part of the Anglo-Saxon inhabitants, and greatly increased the number of slaves. The villains belonging to the estates of the conquered had nothing to expect; they were seized upon as the stock of these estates, and their numbers augmented by reduction of many of the free inhabitants to the same situation, upon various pretences.

pretences. The progeny of these villains being *nativi*, or born slaves, their number behoved to have exceedingly increased, had not the clergy rendered it meritorious to liberate them. This blessing fell first, as among the Romans, to the share of domestic slaves; but the predial villains were allowed long to continue; and, from their necessity and usefulness, were retained in vast numbers by the clergy themselves for centuries afterwards.

The ancient and excellent political constitution of the Anglo-Saxons, where each inhabitant depended upon the public courts, and the society of which he was a member, for protection, being now changed into a feudal dependence upon the barons and nobility, followers of the Conqueror, the old inhabitants, and particularly the Anglo-Saxons ceorls, were obliged to place themselves under this new protection, and to become servants or tenants to the Normans, while the foreign soldiers who had composed the invading army continued to be their vassals. By the former, the families and table of these great men were supported, and by the other they were followed to war. The domains of the lord continued to be cultivated by slaves; that part assigned to his vassals and followers produced the military tenure or knight service, which the best English antiquaries are agreed was unknown to the English before the conquest, and the possession of the other tenants was converted into tenure by soccage; a tenure which Spelman asserts was equally unknown to the Normans before their arrival in England.

Not only rents of lands in general, but even the royal revenues, were at this period paid in produce. Gervasius, the presumed author of the Black Book of the Exchequer, says, ‘in ancient times
 ‘our Kings received neither silver nor gold from their tenants, but
 ‘viſtuals only for the daily provision of their house; and the officers
 ‘appointed to manage the King’s lands knew very well what kinds,
 ‘and what quantities, of provision every tenant was obliged to pay.
 ‘This custom continued, even after the conquest, during the whole
 ‘reign of William I.; and I myself have conversed with several old
 ‘people

‘ people who had seen the King’s tenants paying their rents in several kinds of provisions to his courts.’ This custom began to be altered in the reign of Henry I. who being much in France, and, as Spellman observes, not having that occasion of expending these things on his house, his officers who received them accounted to the sheriffs in every county for the value, at certain rates, and thereby turned his *feorm into money* *.

Having thus inquired into the situation and circumstances of the labourers of the earth among our neighbours, it is time to come back to this part of the Island, and to view the same rank of people as here circumstanced. We can go no farther back for this purpose than to the accession of Malcolm Canmore, anno 1057. At that aera the Annals of Scotland, lately published, commences, because (says the learned author) ‘ the history of Scotland, previous to that period, is involved in obscurity and fable.’ William of Normandy arrived in England a few years afterwards; so that our authentic history may be said to begin at the same period of time with the conquest of that kingdom. The same manners, and the same laws, were at that time certainly prevalent in both kingdoms. In the matter of slavery no difference existed. The Danes who invaded, and settled in the middle counties of England, reduced the greatest part of the old possessors to slavery; and, when the inhabitants of the north of England made inroads into Scotland, their prisoners taken were led into captivity; at least, we are certain that the Scots treated these people in that manner. In the year 1070, Malcolm III. or Canmore, led a numerous army into the north of England, in order to co-operate with the enemies of the Conqueror, and spread desolation thro’ a vast extent of country, commanding, even by way of mercy, that all the young men and maidens should be driven captives to Scotland †; and so great was the number, that, for many years, the English writers declare, that there was not a village, nor even a hovel in Scotland, unprovided with a slave. Reprisals were constantly making

* Page 248.

† Annals, page 40.

king upon Scotland, the consequence of which must have been the same in both countries. The feudal law being at this period introduced into Scotland, or, at least, our former law having assumed the form of feudalism with which we are acquainted, there is no doubt that the lands of the great proprietors, or noblemen, were parcelled out in exact resemblance to those of the same rank in England. The chiefs, or noblemen, were served in war by their vassals, among whom their lands had been subdivided. Their tables were furnished from the produce of their domains; the inland laboured by slaves or villains, and the outland by followers and dependents, or tenants at will.

The condition of these villains, or predial slaves, appears distinctly from a charter of confirmation granted by David I. who began to reign in the year 1124. After confirming former grants, and adding new ones, the charter thus proceeds: 'Concedo etiam quod
'*juste reddantur ecclesie sanctae Trinitatis omnes servi sui quos pater meus, et mater mea, et fratres mei, ei dederunt, et omnes sui*
'*comerlach (i. e. fugitivi servi) a tempore Eadgeri regis usque nunc,*
'*cum tota peculia sua ubicunque inveniantur, et prohibeo super me-*
'*um forisfactum ne injuste retineantur *.*'

Lord Hailes, in his *Annals of Scotland*, takes notice, that, in the 1258, slaves, and their children, were conveyed from one master to another in the same manner that sheep and horses are now, and that not together with lands, but even without them. As the churches and abbies got possession of lands, they acquired slaves in proportion; in so much that Walsingham, the English historian, reports, that some of the abbies of most extensive property had the prodigious number of two thousand villains belonging to their lands.

With these unquestionable authorities, we shall find our antient code of *Regiam Majestatem* in perfect agreement. Several chapters of the second book consist entirely of the laws and customs then in use respecting slaves; and there the reason is given why villains could

* Dal. Collect. in Append.

could have no property, because by such acquisition they might redeem themselves, which it seems at that time was not admitted, for the same reason they had no heirs, nor could be heir to any person. In the *Quoniam Attachiamenta*, which is supposed to be of equal antiquity with the *Regiam Majestatem*, we have the brieve of bondage directed at the instance of masters for apprehending their fugitive slaves. The first chapter of Alexander II. is directed to *husbandmen*, who thence appear to have consisted of vassals to the nobility, of freemen who laboured the ground for their subsistence, and of villains who are appointed to take land from their masters, and to labour it by tilling and sowing, and when not possessed of 'four kye' they are ordained to delve with their hand and foot, as much as might 'be necessary for the support of themselves and families.' If a servant or villain neglected his task, his master is ordered to take for a fine a cow and a sheep; which shows that even villains were supposed to have the use, if not the property, of their cattle.

In the remaining statutes of our succeeding Princes, very little is to be found respecting either servants or farmers. The severities of personal bondage relaxed by degrees over all the Island, which was principally owing to the clergy, who rendered the liberation of the species an act of Christian charity. Rules favourable to personal liberty multiplied in number. In the *Regiam Majestatem* a variety of these appear, which afforded the chance of manumission to bondmen of all denominations. It is true that these chances behoved chiefly to fall to the share of the domestic slaves; but, from the silence of our succeeding laws, it is evident that the distinction between the villain and the husbandman was lost by degrees, and both of them lived nearly upon a level. The business of each was to return a rent in money or produce to a common master, and both equally needed his protection to enjoy the little remainder allowed for their own subsistence; the bondmen just existed, and the tenant could do little more.

The manumission of slaves, however favourable it may sound, like all other sudden changes, gave rise to a number of national inconveni-

niences all over Europe. It filled every state with idle, lazy, and consequently useless people, who had no other estate but their liberty, and who were taught to think that it consisted in idleness alone. In the peaceable reign of James VI. the burden of these vagrants grew intollerable to the nation, which obliged our parliament to make some retrograde steps back to slavery itself. In the 1579, it was provided, 'That if any person liked a beggars bairn, he was 'entitled to take and keep him, or her, in service to a certain age;' and in the 1597, this act is not only renewed but the service of their bairns so taken is prorogated for their lifetime. The personal services of the commonality, after the accession of James, being no longer necessary to landholders, the rents in this country were universally raised, at a time when the nation stood dejected by the departure of their Prince, and when commerce had done little or nothing to its support. This measure rendered a great part of our tenants worse than slaves, and increased the number of the wretched, the idle, and the dissolute.

So long, and so grievously, did these evils continue to oppress this country, that even so late as the 1698, the celebrated Fletcher of Saltoun, seriously proposed to the parliament of Scotland, to re-establish the antient bondage of the commons by a public statute, and for this purpose he addressed to them a very learned and ingenious discourse. 'In antient times (says he) so long as a man was the riches and part of the possession of another, every man was provided for in meat, 'cloath, and lodging; and not only he, but, in order to increase that 'riches, his wife, and children also.' The description given by this gentleman of the situation of this country, within less than a century, and the detail he enters into of the miseries of the common people, who were perishing in numbers for want of the common necessities of life, seem almost to justify the uncommon and unpopular proposal he was about to make.

These evils, and these difficulties, have been in a great measure got the better of. Our increasing commerce and numerous manufactures
have

there was little difference between the German slaves, and the Roman husbandmen. The Saxons, we see, had for ages their slaves and their ceorls or husbandmen ; where the industry of the slave and the freeman, must have distinguished itself in the strongest manner. Had the labour of the former fallen so evidently short of the latter, the cure was at hand ; and nothing was more necessary than to make him free. But our history and records concur in shewing that this was not the case. The return of the slave was in services certain ; and for these services he held lands, the produce of which he and his own family consumed. The abolition of slavery was the work of ages ; and the tenure by villainage clearly marks the principal cause of it, viz. a neglect and indifference in the proprietors of land to the condition of their predial slaves, so long as their accustomed work was performed, or their usual quantum of produce delivered.

The Normans, as we have frequently mentioned, gave every thing a foedal colour and form, or, in other words, a form of dependence. All rights to lands were constituted by charters and deeds ; and these deeds, of consequence, were similar in form to whatever kind of property they related. Thus, interest in land, whether perpetual or temporary, was termed *An estate in the land*. The proprietors were Lords, and all persons holding any thing of them Tenants ; hence the tenant in fee-simple, the tenant in tail, for life, or for years, and so far as their respective interests extended, the rights of these holders were considered to be upon a footing. Thus, the tenant for years had for his term, a perfect right, by force of his deed, equal to that of any other tenant. Upon this account it is, that Lyttleton, and the English writers, treat of all these rights, and these several tenants, in their order, as belonging to the same title or branch of the law. The tenant for term of years is last in order, because his right is the lowest ; it is validated by possession alone, whereas all the others require livery of seisin. The freehold or property is in them ; in the other there is nothing
but

but a temporary right ; but this right is equally good, real, and available to the tenant while it lasts, as the freehold is to the owner. If, therefore, a man made a lease to another, and sold the land, and if the purchaser, by infeoffment, attempted to remove the possessor, or lessee for term of years, the latter was entitled to have the writ *Quare ejecit infra terminum*, against such purchaser, which immediately restored him to his right. A lease is, therefore, by the English lawyers, defined to be a conveyance of any lands or tenements (in consideration of rent or other annual recompence) made for life, for years, or at will, but always for a less time than the lessor hath in the premises. Like other titles to land, therefore, some leases are constituted by fine, recovery, and other ordinary methods.

The Norman lease was, in matter and form, a revival of the original feudal grants, which, it will be remembered, were first at the will of the lord, next for life, and last of all hereditary. The hereditary proprietor then placed others in his own ancient situation ; he gave leases, either by deed, or by parole, at will, term of years, or for life, as could be agreed upon. Such leases were even granted for military services, of which several instances are given by writers upon legal antiquities. Mr Borthwick of Crookston, in a tract lately published, mentions a deed of this kind in the 1395, granted by one of his predecessors to Thomas Cranston, of lands in Mid-Lothian for his life, and the life of his heir-male ; the tenant being to furnish a man and horse to attend in war. The form of constituting this estate for years then, differed nothing from that of the freehold but in the expression of the terms : Both of them were done by deed, or charter, containing the same clauses and the same stile. In this only they differed, the freehold required livery sasine, the lease did not ; hence it followed, that if the grantee of a freehold did not obtain livery before the death of the granter, the feoffment, like our precept of sasine, was void, but the lessor was entitled to take possession even after the death of the lessor ; because, according to Lord Coke, the interest of the term vested in the lessee
before

before entry, or, in other words, the deed stood complete upon execution.

Many inconveniencies attended the simple grant, or deed poll. The lessor had no remedy for his rent but that of distraining; he had not an action for his arrear, unless he had been seized in the lands at the time of the lease; 'for (says Judge Lyttleton) it is a 'good plea for the tenant to say, that the lessor had nothing in the 'tenements at the time of the lease, except the lease be made by 'deed indented; in which case, such plea lieth not for the lessee to 'plead.' The reason is, that the parties were then mutually bound by covenant to each other; and the whole words of the deed were in law construed to be the words of both, which was not the case of the deed poll. Besides, it was often in the power of the lessors to avoid the lease, by suffering their rights to the property to be collusively quarrelled, and set aside, by feigned actions in the courts of law; nor was the tenant allowed to falsify or defend these actions, because he had no right in him to the property. The deed indented proved a salvo in such cases; and the tenant was afterwards admitted to his defence, by two several acts of Parliament.

A lease by deed poll, could only be granted of real hereditaments, which might be distrained for the rent reserved. But, as Lord Coke observes, no rent can be reserved out of incorporeal inheritances, such as offices, multures of a mill, tithes, fairs, markets, liberties, and the like; but if the lease of them be made by a deed for years, it may be good, by way of contract, to have an action of debt; but distrain the lessor cannot. Lastly, several statutes passed in England, for restraining certain persons from making leases, who had the power of doing it at common law, and to enable others who had not that power. These acts appoint all leases executed under their authority, to be done by contract, or deed indented; and hence, the form of a lease by deed poll went entirely out of practice, and that of the indenture came to be universally established.

The

The first part of an English lease, is expressed in almost the same words with the charter, and contains the *premises*, the *habendum*, and the *reddendum*; after which follow the mutual covenants of the parties. The principal circumstance in the deed worthy of attention, is *the habendum*, whereby the right goes to the tenant, his executors, administrators, and assigns. The reason of which is, that a lease, or interest, for term and years, is in England a *chattel real*, such tenant having no radical right to the property, and only an interest connected with, or annexed to a real estate. The law, in order to distinguish it as much as possible from the freehold or inheritance, gave the succession to the executors, and not to the heir. Another reason given is, that the claim of the master, upon the death of the tenant, lay against the executors; therefore, the executors were entitled to continue the possession during the whole term of the lease. The master, in the next place, reserves a power of distressing for his rent; and, in case of no distress being found, or, in other words, in case no stock being upon the land, he is at liberty to reassume the possession. This reservation of the power of distraining, only marks how closely the title of the lease is borrowed from that of the charter, or freehold grant. This power is inherent in the proprietor, bestowed upon him both by the law, and the nature of the thing. In the charter, such a reservation was necessary, because the property is thereby conveyed, which is not done by a lease; but as both the property and possession are vested by a deed in the title of a grant, the reservation proper to the one is continued in the other. The reserved liberty to reassume the possession, is proper, because the right of possession vests, by the lease, in the lessee; and therefore it is rightly qualified by these reservations.

Having now accounted for the original form of the English lease, we are to inquire into the effects of this deed, which we shall take in the words of Judge Blackston*: ‘Because no livery of seisin is necessary to a lease for years, such lessee is not said to be seised; nor

indeed;

* Vol. II. p. 144.

‘ indeed does the bare lease vest any estate in the lessee, but only
 ‘ gives him a right of entry on the tenement ; which right is called
 ‘ his interest in the term, or *interesse termini*. But when he has
 ‘ actually so entered, and thereby accepted the grant, the estate is
 ‘ then, and not before, vested in him, and he is possessed, not proper-
 ‘ ly of the land, but of the term of years ; the possession or seisin of
 ‘ the land remaining still in him who hath the freehold. Then the
 ‘ word *Term*, doth not signify only the term specified in the lease,
 ‘ but the estate also, and interest that passes by that lease ; and there-
 ‘ fore, the term may expire during the continuance of the time, as
 ‘ by surrender, forfeiture, and the like.’ It is possession alone, then,
 which gives effect to a lease.

Sir William Blackstone is further of opinion, that these estates were originally granted to mere farmers or husbandmen, who every year rendered some equivalent in money or provisions, as rent to their lessors or landlords ; but, in order to encourage them to cultivate the ground, they had a permanent interest granted to them, not determinable at the will of the lord ; and yet their possession was esteemed of so little consequence, that they were rather considered as the bailiffs or servants of the lord, who were to render an account of the profits at a settled price, than as having any property of their own. Hence, a reason above noticed is deduced, why the lease in England is a chattel, or goes to the executors of the lessee, viz. that it was the business of these executors to make payment of the debts due by the testator to the lord, and his other creditors ; for which purpose, they were entitled to the stock upon the farm.

As the tenant for years had no right in the land itself, but merely a right of possession, the law allowed him to be defeated by the power of a mere form. The proprietor of the freehold contrived to have a recovery brought against him, at the instance of another person, pretending a superior right, upon which he made default ; consequently, the right of the former proprietor being thus apparently set aside, the leases depending upon it fell at the same time ; nor was
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the tenant allowed to defend the action, though he knew it to be collusive; 'because (says Lord Coke) he could not have the thing 'that was recovered;' *i. e.* he had no title of any kind to the freehold.

The first remedy, in England, to this uncertainty of the lease, was given by the statute of Gloucester, which entitled the tenant to a trial, whether the demandant in the recovery, or, as we would say, in the reduction, did move the plea by good right or collusion; and if it were found by collusion, the termor should enjoy his term. This statute had many exceptions; and therefore an additional one was made in the 21st of Henry VIII. extending the remedy to all cases, and giving power to falsify all manner of recoveries had against the tenants of the freehold upon feigned and untrue titles. Here Judge Blackstone observes, that since the tenants by lease have been protected against these fictitious recoveries, and their interest rendered secure and permanent, long terms became more frequent than before, and have been extensively convenient for family settlements and mortgages.

Thus we have traced the lease in England through all its varieties. We have seen, that, from being a mere chattel or moveable, it arrived to equality in effect with the highest deeds of inheritance. Before dismissing our account of the English lease, we shall mention a circumstance which differences it very much from that of Scotland. The English never seem to have admitted a doubt, of a lease, once completed by possession, being good against a grantor, against the heirs of that grantor, and against all others coming in his right; for the device which we have mentioned, presumes a superior right in the demandant. This was not the case in France, nor, for any thing we can learn, is so to this day. Leases are not good against the purchasers of the land, either legal or voluntary; the tenant, in these cases, has nothing but an action of damages against the lessor; the reason for which is, that the lease bestows not the *jus domini*; nor did it make any difference, that the leases were known to the

purchaser, or even published in court. The practice is, therefore, in the cases of voluntary sales, to bind the seller to a confirmation, or renewal, for the subsisting contract of location. This rule, taken from the Roman law, seems to have been adopted in a very early period by our ecclesiastical Judges. After slavery had been almost entirely forgot, the old distinction among the labourers of the ground entirely ceased, and all of them came to be level, those excepted whose long attachment to the families of their masters procured them easier rents, and the more endearing term of *Kindly tenants*. Leases or tacks were also introduced from the practice of the neighbouring countries, to secure to these poor people the fruits of their labour, which, however, had no effect but against the granter. Very little traffic during these times took place in the distant counties; the produce of the land gave a mean price; and therefore, agriculture was carried no farther than for the support of the proprietor, his tenants, and followers. The tenants had nothing to give; their personal services, made, in most cases, the best part of the rent. The tenant, therefore, depended totally upon his master, and consequently followed his fortunes upon all occasions. During the constant intestine war in which our great men were engaged, land frequently changed its masters, more, indeed, by forfeitures than any other cause. The new proprietor had a race of people attached to himself, to provide for; and therefore he expelled the old possessors without mercy. The tacks, if they had any, availed them not, for the right of the granters was gone; the tenants were too poor to make any use of the Roman action for damages, and the person against whom only it could be directed, was not in a situation to indemnify.

Lands fit for the plough in Scotland, were much more scarce than in the South; and therefore, the husbandman required more encouragement. He met, however, with a variety of depression; and want, and even famine, were frequent. These dreadful evils brought the situation of our tenants much sooner under the eye of the Legislature

signature than in England, where, we have seen, they were first protected by the common law, and grew under that protection into an abuse, where they were checked by a device, and ultimately relieved by acts of Parliament. We are now arrived at our own statutes in this behalf, the first of which we find in the reign of James II. in the 1449. 'It is ordained (says that act), for the safety and favour of the puir people that labouris the ground, that they all, and uthers that hes taken, or fall take lands in time to come, fra lords, and hes termes and zeirs thereof, that suppose the lordes sell or annaly that land or landes, the takers fall remain with their tacks unto the ischew of their termes, quhais hands that ever thay lands come to, far sicklike maill as they took them for.' This statute proves, that tacks had been long in use, though considered under the Roman idea of personal contracts, binding only the granter, and falling with his right. The tacks alluded to in the statute, must have been constituted by writing; and the form of this writing, we are told, was like those in England, that of a single deed, granted by the master. 'It was (says Lord Stair) * ordinarily granted by the seller to the tacksmen, without any mutual obligation upon his part, like unto a charter: But because the tenant, not being bound, might, at the end of any year before Whitsunday, renounce such a tack, and be free, as being in his favour, therefore they are now ordinarily by way of contract, whereby the tacksmen, as well as the setter, is obliged to stand thereto.' Thus, it will be observed, the form of the lease both in England and Scotland was exactly the same, and changed from that of the deed poll, or grant, to that of the contract, for the same reasons.

So nearly did the ancient tack resemble the charter, and so much had the bad effects of the law respecting them been felt, that we are told, frequent attempts were made to render them real by sasine. 'Possession (says M'Kenzie) † is the same thing to tacks, that sasines are to alienations; and of old, some tacks had sasines or in-

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* Instruments

* P. 326.

† Vol. II. p. 189, in ob.

‘ Instruments of possession ; but neither is necessary, or is now usual.
 ‘ And the reasons why they used *fasines* then, being to make the tack
 ‘ real, and to defend against singular successors, this was no more
 ‘ used after the act of Parliament which makes a tack a real right.’

It is curious to observe, how closely we adhered to the *fasine* in comparison with the English. Tacks in Scotland were held to be personal, because they wanted *fasine*. The English gave them effect from the circumstance of possession ; and we endeavoured to attain this, by changing their form into grants by *fasine*. Our statute then bestowed at once the English property upon the Scottish leases. The English had abused the powers of this deed, by extending them to perpetuity, which forced proprietors upon methods of defeating them. Our adherence to *fasine*, and to our fixed titles of alienation, prevented these long leases from taking place with us. It never, therefore, became an object to defeat them by legal devices ; consequently, we had no use for the statute of Gloucester, or that of Henry VIII. which are in England the muniments of their lease held estates. On the other hand, the English never had any occasion for such a statute as ours of James II. What the common law did in England, required a special statute in Scotland ; and, on the contrary, the English statutory privileges were bestowed upon the Scots leases by the common law. Where the right of a tacksmen is quarrelled, he is entitled to plead every defence competent to his master, for the support of his own lease.

The act we have considered bestowed a reality upon tacks, not only of lands, but by extension to tacks of all other subjects, and maintained them against every person, in the right of the granter ; but when that right fell, the tack behoved still to accompany it. If, therefore, the land returned to the superior, it returned free from all the deeds of the vassal.

When this happened by reason of ward, the tack was said to sleep ; and revived upon expiration of the ward, or other impediments. Lifereinters, conjunct fiars, and wadsetters, set tacks which
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considers the last as a consequence of the first. 'The real right' (says he) thus established in the tenant, behaved to regulate the property of the fruits. The maxim, *Quod solum solo cedit solo*, which formerly gave the property to the landlord, was thought to apply now in favour of the tenant; and thus, after the rent was paid, the remaining fruits came to be considered as the tenant's property. And the statute had so quick an operation, that a remedy was provided, at least as to personal debts, by the act 36. 1469.

In that statute, however, there is no allusion to the former statute, nor any restriction of the benefit to tenants by lease; it is a general remedy, extended to all poor men, inhabitants of the ground. It mentions the *goods and cattle of these men* which were distressed, and declares them to have been their own; and certainly they were so, independent of the nature of their possession, whether with or without a tack, even with or without any lien upon the ground. The reason of allowing the tenant to be distressed for the current mail is this, if the creditor delayed until the usual term was over, it was a great chance but that the rent might be paid before he could execute his distress; and consequently, might have been put off for years before he got any thing. At the same time, it was still an act of gross injustice to force the tenant to pay his rent, contrary to the terms of the contract. This hardship has at last been removed, by the introduction of arrestments into practice. Creditors found their business more cheaply and more agreeably done, by an arrestment in the tenant's hands, which, with a decree of forthcoming, entitled them to draw the rent, and save the tenant from the hardship which the statute had continued him subject to, from public expediency. This practice is now so established, that it is apprehended, a poinding for the current term would entitle the tenant to an action of spulzie and restitution.

Having now given the history of the antient tenants in this country, and of our later tacksmen, we come to those other possessors of the ground common in the last century, under the title of *Rentallors* and

and kindly tenants. Both in England and Scotland, the lords and proprietors of land had a number of tenants upon their property, who had immemorially occupied their possessions, and paid their original rents, and other services. These people were the progeny, partly of the villains who had become free, and of freemen who farmed the lands: They had no charters, leases, or other rights to their possessions, but attended the courts of their lords, and had their names, payments, and possessions entered by the bailiffs or stewards, in the rentals or lists of tenantry belonging to the manor. These possessions, in England, by the neglect of some masters, and indulgence of others, grew into a right: The son succeeded the father, by entry in the Court; alienations by surrender came to be admitted; and thence arose the tenure of copyhold, by which a great part of the lands in England are now held. The origin of the kindly tenants, was the same with that of the copyholders: They and their predecessors had long remained upon the property-lands of the King, the church, and of many of the great families; their rents were easy, and a particular degree of kindness and attachment were presumed to subsist between them and their masters. The church being possessed of a great part of the lands of the kingdom, moderated, by a piece of good policy, the envy that must have attended that situation; they let their lands to the younger sons of families at moderate rents, assumed them into the state of kindly tenants, and allowed them to possess, so long as they paid their rent, from generation to generation.

These long possessions created an idea of a right in the possessors; and attempts were made to convert their rentals into titles of inheritance. In the west country, many rentallers were termed heritable proprietors; and several of their rentals have appeared in Court, not only granted to the tenants, their heirs and successors, but in the words of resignation, viz. *in perpetuam remanentiam* *. Their widows succeeded, and their sons were received. In course of time, these

* Achanny against Aiton, March 16. 1632.

these rentallers would certainly have created a tenure of their own, like their brethren the copyholders of England. Thus, Balfour has preserved a decision, finding, 'that an man being rentalled in the King's rental, of any lands and possession, and deceases, leavand be hind him a wife and bairns, the bairns ought to be rentalled, and the wife should bruik the same for all the days of her lifetime, allennarly, and has no power to put any other person in the rental.' The rentallers in Scotland, however, were overtaken in their progress by a fatal revolution, which the copyholders in England entirely escaped. For some time previous to the Reformation, the churchmen, foreseeing the storm that was gathering around, feued, fold, and disposed upon as much of their land as they conveniently could. The reformers endeavoured to prevent them by acts and proclamations, which, indeed, proved effectual as to a great part. So soon as the church-lands in general came to be appropriated by their new masters, the old rentallers and kindly tenants were without distinction threatened with removal. These farmers (says Bishop Keith) being 'a great body of men, dispersed up and down in all parts of the nation, began now to murmur against the new lay-feuars of the kirk-lands, who wanted either to remove them from their possessions, or raise their farms; and it was not judged adviseable to irritate this great body.' Accordingly, an act was made to keep them in possession, in which a kind of right is acknowledged in the rentallers; they are called, the lawful and kindly possessors of the kirk-lands. But this and other acts gave them no relief; they were put out by degrees, and such of them as remained were obliged to consent to the turning of the rentals into feus, and to pay double the sums and services they used to do to their old masters. When the rentals, at the Reformation, came before our Judges, they did not know what to make of them; and therefore, where no special time was limited, they rejected them entirely, or, which is nearly the same thing, sustained them only for a year. Afterwards they came to a better way of thinking, where no time was mentioned: They, as

Craig

bendum, we may term the *destination* of a lease; and as the looseness of expression in that material part has given rise to a number of disputes, it is proper that the value and import of each word used in the conception of it, should be precisely known. The law classes the lease under these contracts which are *stricti juris*. A man is thereby supposed to divest himself of the possession of his property, and commit the management of it to another; his words, therefore, are to be strictly interpreted. In the next place, it was the most material of circumstances for the proprietors of land, in antient times, to have no body around them but friends, vassals, and tenants, composing what was termed *his followers*. Lawyers dignified this idea, the child of a barbarous age, by terming it a *delectus personæ*, and when the old prejudices wore out, the legal notion continued, and was transferred into a choice, upon account of agriculture, the abilities and good disposition of the tenant. In short, a *delectus personæ* was established in favour of the master, from which he drew arguments in every case where they suited his interest or his caprice. At the time when these principles reigned in their full height, leases, though for a term of years certain, where heirs were not expressly mentioned, determined at the death of the tacksmen. Our Judges soon relaxed from this rigour, and leases have long descended, though heirs are not mentioned; and the better rule, *Qui providet sibi, providet heredibus*, came to be admitted. Lord Bankton speaks of it with some degree of doubt; he says, 'Though a tack mention not heirs, he conceives it will go to 'them *.' It was said, that in England a lease is a chattel, which in every case goes to the executors, the reasons for which were assigned. In Scotland this rule was reversed; for, as far back as we are able to trace the Scottish tack, it went uniformly to the heir of the tacksmen. This is accounted for from the *delectus* of the masters, from the inconsiderable figure which the moveable estate in this country made, and from the custom which preceded the act of Parliament,

of

One case there is, in which the assignment is fatal, at least for a time ; we mean the assignment by marriage. A woman in the right of a lease not transmissible, marries. The conveyance thus brought about, cannot, like the other, be dissolved, and consequently the tack falls, or rather may be said to sleep ; for if the husband dies before the wife, and that a part of the term be then unexpired, our lawyers say that the tack revives *. When such marriages are to be made, it is the business of the writer to prevent bad consequences ; and the most eligible method certainly is, to reserve the tack to the woman in the contract of marriage *per expressum*, and exclude the *jus mariti* of the husband. There is another exception from this general rule. In short leases, the *delectus persone* may be strongly argued from ; and accordingly it has been said, that a man can no more substitute another to labour the ground for him, than an undertaker could substitute another to erect a house which he himself had undertaken to build. But it was obvious, that in leases for long terms granted to a man and to his heirs, the idea of the *delectus personarum* could hardly be admitted ; and therefore, tacks of that kind were found to be assignable, though assignees were not mentioned. A tack (says Spottiswood) fet to a man during his lifetime, and to his heirs indefinitely after him, for two or three nineteen years tacks, may be assigned by the principal tacksmen to anybody, if the assignee be not excluded *per expressum* in the first tack †.

Liferent tacks made also an early exception to the same rule ; and from the oldest decisions we find, that a tack for nineteen years was held equal to a liferent ; and that such tacks, together with liferent tacks, were held to be a species of sale ‡. From the authority of these decisions, Craig gives this rule : ‘ *Affedatio pro novem-
decem annis ut et affedatio ad vitam, species est etiam alienationis.*’ And hence it has been argued, that all tacks for more than nineteen years are assignable. In liferent leases the rule continues ; in the other it remains arbitrary ; though in general it is understood, that

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* Stair, p. 330. † Rofs against Blair, 10th February 1627. ‡ Balfour, p. 203.

no tack of any shorter endurance than for life can be assigned, unless assignees are mentioned; and knowing this, it is our business, where either life tacks, or tacks of long endurance, are not intended for assignees, to exclude them by the most express words, and leave nothing to the construction of the law.

An ordinary tack to a man and his heirs is not only transmissible by voluntary assignment, but the law also considers it to be an estate, perhaps a valuable one, in him, and therefore lays it open to be affected by his creditors, and to be applied for the payment of his debts. Such a tack, therefore, may be reached by adjudication; in which event, the law has postponed the *delectus persone* of the master to public justice and expediency. This led parties to be more express in the conception of this clause: They did not chuse to see their lands come under the management of people they themselves knew nothing about, and perhaps the possession of them brought to public sale; they therefore gave leases to tenants and their heirs, excluding their assignees. Still attempts were made to carry such tacks by adjudication; but the attempt was opposed; the landlords pointed out the difference between property itself, and rights affecting that property, which must be regulated by the will of the proprietor; and stated, that to make a tack, excluding assignees, adjudgeable, was directly repugnant to the principles of property, maintaining, in effect, that a limited right may be extended further than the terms in which it is granted; that if property itself be conveyed whole and entire, a restrictive or prohibitive clause can only have a personal effect, and consequently cannot bar legal assignees: But in the other case, where the property remains in the granter, and is only burdened by his consent, the person to whom such consent is given cannot put another in his own place, no man being entitled to take possession of the property of another contrary to his inclination. The Court accordingly found, that tacks expressly prohibiting assignees, were not adjudgeable.

Lord

Lord Bankton again moves the doubt, whether or not this express proviso, should not have the effect, in the case of parties subsetting, to annul the lease *in totum*? That point still remains a mute one. For the more security, the seclusion is sometimes thus expressed, 'Secluding his assignees, whether voluntary or legal.' At other times it is thus, 'Secluding all others his assignees, excepting such as shall be approved of by a writing under the setter's hand.' The meaning of which is, to put it in the power of the tacksmen to assign, with consent of the master; for if the tack simply excludes assigns, then the assignation by the tenant carries nothing, and therefore a new tack behoved to be executed by the master, upon the surrender of the former tenant, which in many cases might prove inconvenient to the parties; upon which account the adjection of this alternative is accurate and proper.

The next ordinary word in the destination of a tack, is *subtenant*; and a quality is generally added, especially in the more ancient leases, that he should be of no higher degree than the tacksmen himself. The original meaning of a tack to subtenants was, to enable our tenants to people their possessions properly, by parcelling such parts of it for the support of their assistants; but it never was intended to give them a power to sublet the whole, or, in other words, to substitute another in their place. That differs in little from an assignment; and accordingly, some lawyers have been of opinion, that a tack granted to a man and his subtenants could not be sublet *in totum*, and consequently could not be assigned; and it was so decided*. But as the power of subsetting is less than that of assigning, therefore it has been adjudged, that a power to assign implies a power to sublet. The same reason, it is observed, does not subsist; because, by a sublet, the principal tacksmen is not changed. Both Lord Stair and M'Kenzie, following the idea of the strict interpretation of tacks, give their opinion, that no tacksmen can sublet with-

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* Stair, 3d January 1672, Lady Binny.

out the express mention of subtenants *. Mr Erskine states it as a doubt, whether a clause to a man and his heirs, without mentioning assignees, implies a power of subsetting; and in opinion rather inclines for the affirmative. It has been solemnly determined, that a man holding a lease to himself, his heirs and subtenants, may validly sublet the whole, providing security be found to the master †.

Taught by these uncertainties, writers ought in every case to deny that power by express seclusion, or, to give it in direct terms, according to the agreement of parties. If a tack, as it sometimes happens, be set to two persons, and the longest liver, for any term of years, it divides between them during life, and then goes wholly to the survivor.

Having now sufficiently explained the destination of the lease, and all its consequences, we proceed with our stile.—After stating to whom the lease is intended, the description of the subject to be let immediately follows. It generally refers to the possession of the immediate preceding tenant, which for most part excludes all difficulties and disputes in that matter. Then comes an essential part of the lease, the commencement and duration, or, as it is termed, the ish of the tack, expressed in these, or such like words: ‘And that for all the days, space, crops and terms of nineteen years ‡,’ &c. Every tack ought to have a determinate entry; and in old decisions we find, that an error in this circumstance was usually objected to as fatal to a lease. Sometimes the tacksman enters to the real possession, in consequence of a verbal agreement, before his tack is put in writing; in which case, the lease should declare the fact, viz. that the tenant entered at such a term bypast, in virtue of his agreement, and therefore his entry should be declared to have commenced at that term, notwithstanding the date of the lease. In several tacks not very old, the most incorrect and ungrammatical expressions in this part are observeable, the writers not being able to distinguish in language

* This point is now finally settled by a recent decision, 22d January 1788, Alison against Proudfoot.

† 28th June 1758, Crawford against Maxwell.

‡ St Martin, p. 821.

language the preterite tense from the future. The error, it seems, is old, for we find in Durie a decision, where an objection on that head was made to a lease, which bore, that the tacksmen's entry *is* and *shall* be at a term long before the date of the tack; and so, said the objector, behoved to be respected as wanting an entry. The Lords, however, found the incongruity of the writing not sufficient to annul the lease; and it is a rule, that when the term of entry is not specified, the tack is understood to commence at the next term ensuing after its date. But these rules are never to be trusted by practitioners.

It often happens, that tacks are granted to new tenants, before the expiration of the old leases; and consequently, the term of entry in the new tack is obliged to be made at a distant period, and no possession can be had till then. Possession is the life of a tack; and a second tack attaining the first possession, would, in a case of this kind, be preferred. The question is put by Dirleton, and the following practical answer made by Stewart: 'It is thought he may 'make intimation of his right to the present tenant, and require him 'to remove at the time, and protest for remede of law*.' There are tacks in which natural possession cannot be obtained, such as of an estate, or of houses in tenantry at the time: Mails and duties are the subject of such a lease; and therefore, the proper method to render it effectual is, by intimation to the tenant. The tack which is first intimated, by our notions behoved to be preferred.

The next thing is the term or duration of the lease. After tacks were made real by our statute, it could not but be observed, that, if extended to a certain length, they behoved to supplant the established modes of alienation, and especially the favourite one of symbolical delivery or sasine, to which our practice has constantly adhered. In our oldest decisions, we find the liferent lease distinguished as in England; 'whilk kind of tack or assedation, Balfour tells us is 'alienation, and contrary to the laws of this realm.' Liferents, therefore,

* Stewart, p. 299.

therefore, with us, as well as in England, could not be constituted by lease; they required sasine; and no doubt for the very same reasons. When they afterwards came to be admitted in the form of tacks, we find the liferent right entitled to many privileges which were refused to the common tacksmen: They gave a right to remove tenants, and they were assignable. The distinguishing mark of a lease in England, which made it a chattel, was, that it had an issue determinate, lasting only for a given term of years. The English, adhering to this distinction, neglected the obvious circumstance, how much a hundred, or five hundred years, exceeded in effect the value of their freehold life estate. On the other hand, with us the danger to heritable rights was immediately observed; and as grants for life were held to be alienations, our lawyers considered, that a fixed term of years was equal in value to a liferent. This term was fixed to be nineteen years, beyond which, Craig tells us, no tack was valid.

Under the influence of these ideas, tacks for any length of time were ventured upon with timidity, and for a certain period considered as informal and insecure. The act 1469 had it not in view to raise tacks to equality with titles of inheritance; and with us, as in England, the essential quality of a lease came to be, the having a certain and determinate issue, or fixed number of years. Nay, so much were our forefathers impressed with these ideas, that even when they wanted to constitute a very long lease, or even a perpetuity, they did not venture to express the terms of an hundred years in round numbers, but they divided it into five, ten, and into nineteen years; so that such leases were, in effect, obligations to renew from period to period; and this practice is retained to the present moment, though it may now be altered with safety. The reason why nineteen is such a common period in leases is, because that space was early considered as equivalent to a life; and hence our tacks for three times nineteen, or three lives: And another reason.

was, that from being considered as liferents, they were found entitled to several of the privileges belonging to that class of rights.

Afterwards, instances occurred of leases granted to a man and his successors for perpetuity. Thus, Edward Lord Sanquhar, in the end of the 15th century, set a tack of the lands of Glenary, to Nicol Crichton, and his successors, for five years, and so forth, from five years to five years, for ever. This tack came to be quarrelled, in the 1631, at the instance of the heir of the granter, who alledged, that it was null, as having no ish, but set for ever, and so not of the nature of a tack. The deed, however, was sustained, in regard it was not competent to the heirs of the granter who were bound in warrandice, to object, although a singular successor might have done so *.

Other instances afterwards followed. In the 1717, a tack or rental, granted in the year 1680, by William Irvine to Carruthers of Holmains, of certain lands, 'perpetually and continually, as long as the grass groweth up, and the water runneth down,' was sustained upon the same principle, that a proprietor is at liberty to grant an obligation that may be good against himself and his heirs for ever†. Lastly, The question seems finally to have been determined in the following case‡. Cockburn of Ormiston granted a tack to Robert Wight for two nineteen years, and obliged himself to reiterate and renew the same from nineteen years to nineteen years, after the outrunning of the first two. The Earl of Hopeton coming in place of Cockburn of Ormiston, objected, that that obligation did not import a renewal to perpetuity; and that a tack without an ish, is subversive of the principles established by the law of Scotland for the conveyance of property. The tacksmen answered, upon the decision before stated, that perpetual tacks, however ineffectual against singular successors, are undoubtedly good against the granter and his heirs.

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* Durie, 26th July 1631.

† Dictionary, Vol. II. p. 419.

‡ 17th September 1763, Wight against the Earl of Hopeton.

The same decision, if held for a rule, also establishes, that in some degree perpetual leases may be good even against singular successors; and it points out the legal import of a clause very common in practice. In the purchase of lands, it is the known duty of the purchaser to inquire into the particulars of the subsisting leases; for leases do not infer warrandice against the seller. Accordingly, the practice is, to convey the subaltern feu-rights, and the leases of the tenants, sometimes generally, but oftener particularly, to the disponee. And, in order that he may preserve the benefit of every legal objection to these rights, a declaration is added, that such conveyance shall not infer any homologation, but that it shall be lawful to quarrel and impugn them upon any ground competent in law. At the same time, for the benefit of the seller, these words are also always subjoined, 'that may not infer warrandice against me and my forefairs.' This was precisely observed in the Earl of Hopeton's purchase. It was pled, that such a clause left him at liberty to avail himself of every argument competent to a singular successor; and that, if leases perpetual in endurance were allowed to be real against purchasers in his situation, feu-rights and infeftments would become superfluous, and property even the most valuable, might be transmitted undiscoverable from any record. It was answered, that as the Earl had taken an express assignment to this lease, and all clauses and obligations therein contained, the exception of it from the clause of warrandice behoved to comprehend every obligation that could infer warrandice against his author. The Lords 'found, that Lord Hopeton, though a singular successor, 'stood barred *personali objectione* from making the objection.'

Perpetual leases, then, may be sustained, as long as an estate is transmitted by legal voluntary sale. Such purchasers are always presumed to inquire into the tenants leases; and such inquiry will form a personal bar against any quarrel at their instance; for the special reservation of legal objections, does no more than put the purchaser in the situation of his author. When, indeed, the estate

comes to be adjudged, it is presumed, that singular successors by legal titles will be at liberty to avail themselves of the general objection to the nature of the right. If, therefore, we happen to be concerned for any tenant upon such a title, all we can do is to inhibit every successive proprietor, and his heirs, upon the warrandice. The inhibition going to record, would, we presume, protect the user of it against creditors. A right thus established keeps up some resemblance to the English copyhold tenures.

There is no use, however, for running any risk upon these heads in time coming. No more, in England, is necessary than a determinate number of years. A lease for a thousand or more may surely be termed a perpetual right; and for any thing that we can discover in our present practice, the same easy method will be effectual with us. Such a deed having a certain entry, tack-duty, and issue, is a tack in every sense of the term. Lord Bankton speaks in a decisive tone upon this article. He tells us, that tacks having an exorbitant term of years, such as some thousands, which may be longer than the world shall last, are void, as to onerous singular successors, because they are in fact conveyances of the property. Such leases, however, have been supported, and that in the last resort. In the 1670, Hugh Lord Lovat granted a tack to Simon Frazer for nineteen years, and so from nineteen to nineteen, till the term of 1140 should be completed. The tacksmen, justly doubtful of the nature of such a lease, attempted to realize it by precept of sasine and infeftment, in the same form as those in use prior to the statute 1449. Upon the forfeiture of Lovat, a claim against the Crown was entered by the tacksmen; to which his Majesty's advocate objected, 'That a lease for so long a term was an anomalous right, and ineffectual by the law of Scotland.' *Secundo*, That supposing it good against the granter and his heirs, it could not be good against singular successors, otherwise the faith of the records would be unhinged.' The tacksmen did not rely upon his sasine, which was undoubtedly an informal right; but he answered, that there was no law or usage limiting leases to any certain number of years; that by the statute

§449, all tacksmen in possession are declared to be secured against purchasers, without any limitation as to the length of their endurance; and he informed the Court, that upon the faith of the law so standing, many leases had been purchased in different parts of the kingdom for a thousand, and others for several hundred years. He produced a list of these leases, and averred, that great sums had been laid out in building, and other improvements, upon the subjects leased. With regard to the presumed danger to the records, he denied it, because all tenants claiming the benefit of the statute must be in the natural possession; and no purchase of lands is ever made, without previous enquiry at the tenants with respect to the endurance of their leases, who have no interest to represent them shorter than they truly are. The Lords, full of the former ideas of our law and practice, considered this tack as a perpetual right not to be sustained against singular successors; and therefore, found that it was not good against the Crown. The tacksmen carried the matter to the House of Lords; and these Judges, entertaining quite opposite ideas, and accustomed to leases of the like endurance, reversed the decree*. The Court of Session, conforming to this decree, sustained a tack for 1260 years†. So that now it is established, that tacks have no limitation of endurance, if, as in England, they bear a certain and determinate issue.

The order of the clauses leads us next to that of *warrandice*, which is for most part absolute, and expressed in the same words as in a sale. The tack may be considered as a sale of the possession for a time; and this obligation is particularly necessary in tacks, because the tacksmen are not apt to inquire so much into the titles of the granters, although, as in other cases, the validity of the lease must entirely depend upon that of the lessor's right; and we know, that tacks are granted by liferenters, adjudgers, conjunct fiars, possessors of entailed estates, and others, having temporary or dubious rights. If, therefore, the tack falls by deficiency of titles, an action of damages lies upon the warrandice.

Here

* 6th December 1758.

† 27th June 1760, Irvine against Knox.

Here terminates the master's part of the contract. He has let the lands under a description certain, and obliged himself to warrant the possession from all interruption and disturbance. Next comes the tenant's part, *i. e.* the payment of a fixed rent or duty, in money, in victual, or other produce, or the performance of services. A certain rent or return for the lands is essential to a lease; it was so by the Roman law; it was so by the law of England; and by ours, the act of Parliament 1449 protects only leases whereby mail is paid to the proprietor, and that upon condition that the same maills be continued to the singular successors. Hence we find in Craig, ‘* Quod ‘ si affedatio facta fuerit sine mercede, nec certam contineat non valet ‘ ex jure (et ita decisum vidi in causa mota per Comitissam de Angus ‘ contra Dominum de Ardrrie), nisi aliquid pro mercede aut loco mer- ‘ cedis sit appositum, veluti servitii aut debiti compensatio.’ This rule, however, regards singular successors alone; for there is no doubt but a proprietor may let his lands for nothing, or he may receive a premium for doing so, all at once; but then such a lease is good only against his heirs and gratuitous singular successors. This return of duty may be small, but it must not be altogether illusory; and hence, according to the present doctrine of long leases, it is clearly in the power of the proprietor to make an effectual grant of his property, for an annual payment, almost next to nothing, and to receive a premium for that purpose. It is not uncommon, in this place of the contract, to grant the receipt of *grassum*, if it has been paid, or to take the tenant bound to such payments under that name. The *grassum* was the old acknowledgment paid by the kindly tenants to their masters, like the fines of the English copyholders, upon the renewal of the rights; but when our custom went out of fashion, the acknowledgment was continued. By the terms mentioned by St Martin, we see, the victual duty is payable between Yule and Candlemas; it is reaped at the Martinmas preceding, and presumed to be dressed and ready for delivery before the Candlemas thereafter;

* Page 279, sect. 2.

ter; and the money is generally payable at the Whitsunday succeeding, that further time being allowed to the tenant to convert his produce into money.

By St Martin's lease, kain-fowls are to be paid, sometimes also fed cattle are conditioned as a return; a remainder of the ancient mode of living, when all rents were paid in kind, and consumed upon the spot. These payments in fowls or cattle are termed *Kain*, from *canum*, a word used in old charters for the duty payable to the superior, especially in the deeds of bishops and kirkmen. Not only kain, but personal services of various kinds, were stipulated to be paid by tenants, or performed by their cattle, the same as had been done of old by the villains. In the tack we are considering, they are called *Arages*, and *Carriages*, at the times used and wont; and for the most part, the tenants were taken bound to perform the services *used and wont*. These undeterminate services had been a source of dreadful oppression, and show, in the strongest light, the misery, the worse than slavery, in which the commons of Scotland were held by their superiors. At last, these undeterminate exactions came to be considered by Government as one of the sources of improper influence over the tenantry of Scotland, which contributed to the last rebellion; and therefore, by a clause in the act for abolishing heritable jurisdictions, it is provided, that no tenant or tacksmen in Scotland should thenceforth be obliged 'to perform any services to his heritor or landlord, other than such as are expressly observed, enumerated, and ascertained in some written agreement, signed by the parties, or some persons authorised by them.' The special terms in the lease, then, are only to be depended on, and no allusion made to, or dependence had upon, usages of any kind. St Martin's tack is closed with the mutual obligation common to all contracts; the nature of which we had formerly occasion to explain.

We shall now take notice of the other most usual clauses, which practice has, since St Martin's time, introduced into tacks. All public burdens, taxes, and impositions are payable by the master;
and

and so are ministers stipends, and other payments, to the church; they being intended as burdens upon the property. From our statutes imposing taxations in former reigns, we find, that heritors were accustomed to squeeze the burdens imposed upon themselves from their tenants. The act 181st of the 15th Parliament of James VI. appointing a taxation, provides against this crying evil, and lays the burden upon the landlords. It is otherwise with schoolmasters salaries; for, by the act 1696, heritors are entitled to relief from their tenants, of one half of the proportion allocated upon their lands. If, therefore, it is intended that the tenant shall pay all, or any other part of the other burdens, they must be bound expressly to do so, and to report discharges when they pay their rent. Sometimes, to save the proprietor trouble, the tenant is bound to pay these burdens in part of his return. In that case, the tack always declares, that the receipts of such burdens shall be received in part of the rent.

There is another species of oppression, which has existed from the earliest times, *i. e.* that of restricting tenants to proprietors mills; and in the leases, tenants are sometimes bound to bring the whole-growing corns upon the lands (seed and horse corn excepted) to the mill of the proprietor to be ground, and to pay the accustomed multures and duties, conform to use and wont. These customs we had originally from France; they are of various kinds, and termed in general, *Bannalité de moulin, four, ou pressoir*. It is a right, say the French, whereby the lords can oblige their subjects, that is, those who dwell within their territories, to grind at their mills, bake in their ovens, or make wine in their presses. In short, they were the taxes with which these petty princes loaded the people under them. To us moderns, they carry an air of meanness and oppression; but, in these days, there was no traffic; the preparation of the absolute necessities of life, was the only circumstance which brought the produce of the earth into a situation to be taxed; there was little sale or commerce in corn, bread, or wine; and therefore,

therefore, superiors could only tax it when it came to the mill, oven, or press; and to make sure work, they created them themselves, and discharged all others in their bounds. The tax of thirlage, and other duties and services, belonging to it, are unfortunately excepted from the statute which abolishes the remainder of personal services; but does not extend to services by law, or customs due to mills, or any thing thereto belonging.

No clause is more usual, and none has created more differences, than the obligation which is generally laid upon the tenant, of keeping the houses upon the farm in repair, and leaving them so at his removal. The presumption is, that the houses are tenantable when the tenant enters, because, if they are not, the proprietor is bound to make them so; and therefore, it is the tenant's business to be satisfied on that head. In order to prevent disputes upon the article, a declaration of the sufficiency is almost always entered in the lease, and the tenant is made to accept them as in good condition. This being done, he is obliged to keep, and leave them so at his removal. Still, however, the ordinary *tear* and *wear* are understood to be allowed: The tenant will do no more than is absolutely necessary to keep out the weather; and therefore, at the end of a tack of any length, the houses and conveniencies upon the generality of the Scots farms, at no time good, are in a bad situation.

A clause irritant is also common in leases, declaring, that if two years rent be allowed to become due, or remain unpaid at the same time, the lease shall fall. This was transferred from feu-rights, which were the same thing as perpetual tacks, to short leases; and we find in our earliest decisions, that such a condition was presumed to exist in the nature of the contract itself, though no express clause was inserted. This tacit, or inherent condition, requires a declarator, and is allowed to be purged or discharged by payment at the bar. When the irritancy is conventional, by a special clause, the effect is different. The act of Parliament 1597 declared, that all feu-rights should become void, after the expiration of two terms

unpaid, in the same manner as if a clause irritant had been specially inserted in the infeftments ; which shows, that the conventional irritancy has at all times taken place *in terminis* ; and therefore, after the terms are run, and an action of declarator brought, such action cannot be cut off by payment at the bar ; and so the Court have again and again determined. This clause is allowed to have a much stronger effect in leases than in feu-rights, which being considered as a property superior in value to the feu-duty, the feuar is supposed to suffer a loss, or, in other words, to lose his estate, by way of penalty. Though, therefore, the right itself imports a legal irritancy, and though the effect be doubled, by adding a conventional one, still the Judges are in use to admit of payment in Court. A tack, on the contrary, is not considered to be a property, but as a kind of burden or servitude upon property. The possessors of the tack-duty are presumed to be equal to one another, and therefore a penal loss is not supposed to happen ; consequently, the agreement of parties may more strictly be observed. If this distinction continues, it will preserve one advantage to the feu over the long tacks, now come into fashion, although the reasoning will not apply, for these new leases are perpetuities, equally valuable to the holders as the more ancient feu-rights. Even in the case of leases, slight excuses, or variation of circumstances, have often been received to defend from this irritancy, particularly the acceptance, however small, of any part of the rent. Masters, therefore, who wish to take that advantage, are careful to refuse partial payments of arrears. The common expression of the clause, has also given rise to a doubt as to its meaning. The ordinary words are, ‘ if two years rent be allowed to run into the third unpaid.’ Though the expression is very old, and to be often found in our statutes, when the Judges came to interpret it, they found, that three terms, and sometimes three years, behoved to be complete. At last, in February 1729, they altered, and found the irritancy in a tack incurred by the running of two
years

years unpaid. It must here be noticed, that there is a great difference between terms and years : The legal irritancy is two full years ; whereas two terms are only one year ; and therefore, where the legal time is so much shortened, we make little doubt that the Court would allow the irritancy to be purged. These conventional irritancies are often so expressed, that the tack is to become *ipso facto* void by non-payment, without any declarator or process ; and our law-books say, that a removing in that case may be pursued directly, without a preceding declarator. We know of no instance where this has been done, and, if admitted, we apprehend it can only be where two years, and not two terms, are run. The expiration of one year in all cases entitles the master to caution for so many years to come, or to remove the tenant, as will be afterwards explained in its proper place.

The last clause is that whereby tenants are taken bound to remove at the expiration of the lease, and to leave the same void, for the occupation of the proprietor, or his tenants, who are also declared to enter into the same *brevi manu*, without any previous warning, or process of removing. Clauses of this kind are of considerable antiquity. Anterior to the act of Parliament of Queen Mary, ' anent ' removings,' tenants were treated in a summary and barbarous manner, being often ejected with tumult, and by force. The act of Parliament checked the violence, and occasioned an evil of an opposite kind. The precision requisite in executing the forms thereby prescribed, in those days of rudeness made a removing a matter of difficulty, expences, and delay ; to avoid which this clause was decreed, and inserted in tacks ; and according to Craig, they were allowed a full and literal execution. We shall not at present enter into the law and practice relative to removing tenants, as we have so fully discussed in another place *.

The usual parts or clauses of tacks being now discussed, we proceed to some observations which may appear worthy of attention,

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and

* Vide ' Essay on the Removing of Tenants,' published by the author.

and may prove useful in practice. As many tacks are now properties of value, and in fact have become perpetual rights, it is necessary, where valuable considerations are paid, that the doers for the lessees should be as careful in examining the titles of the granters, as they would be in the purchase of lands. They are to remember, that leases granted by liferenters, adjudgers, wadsetters, husbands of heiresses, in short, by all those whose right to the lands is only temporary and redeemable, are of equal duration to their own right, the general rule of law expressly applying in these cases, 'Resoluto jure dantis resolvitur jus accipientes.' The title most likely to impose is that of conjunct fiars; or, where the husband takes upon himself to grant a lease of lands provided in liferent to his wife, such a tack lasts no longer than the life of such husband: It is optional to the widow, upon his death, to remove the tenant; though, if the fee is in the husband, the tack may revive again upon the death of the liferentrix; but that is a slender comfort. We ought, therefore, to know with precision, in whom the property lies, and make all concerned parties to the lease. The best method to attain this knowledge, is to search the records, which appears equally necessary as in a purchase; for a proprietor whose estate is affected by adjudications or heritable debts, cannot grant a lease to the prejudice of these creditors. Possession is no doubt the infestment of a tack; but though possession be obtained, it cannot stand in competition with the prior infestments. This occasions a good deal of difficulty in the matter of prorogations or renewals of tacks; for it often happens, that during the currency of one tack, parties make bargain for a second; and the question is, in what manner such a transaction may be executed with the greatest safety to the lessee?

Let us first, then, understand exactly the distinction between a prorogation and a new tack. A prorogation is a lengthening out, or extension of the same thing; consequently, a prorogation of a tack should recite the former one, and ought not to differ from it in rent, or any other circumstance, to the prejudice of the proprietor, the



right intervening before the husband's death, for want of possession upon the part of the wife. The method to avoid this is, no doubt, to grant the tack to a trustee, for her use and behoof, or to himself in that character: The husband will then possess *jure mariti*, and the wife, it is imagined, would be allowed to continue the possession after his death.

On the other hand, supposing a man wanted to defeat the conquest provided in a contract of marriage, it is plain, he may do it by setting a tack over the conquest lands at a small rent, or he may make purchase of such a tack with his money; for tacks do not fall under the general clause of conquest, unless specially expressed.

Many attempts have been made to convert tacks into wadsets, or securities for debt. It is natural for proprietors who have opulent tenants, to solicit loans from them; and the tenants are ready to give them, upon being allowed retention in their leases, which, in these cases, are always favourable to the lender. Transactions of this kind have occasioned a great deal of dispute, and a great deal of loss to the creditors. The favourite mode of doing this business was, to allow retention of the tack-duty, and to declare, that the lease was to subsist until the principal should be repaid. The Court, for a considerable time, inclined to support this species of securities; they distinguished the cases where the leases were set for a certain number of years, and not indefinitely until the money was paid, and the cases where the retention was not total, but left a surplus or remainder duty, which they held sufficient to the constitution of a tack. The principle of these decisions undoubtedly was, 'that the heritor might have let the lands for that surplus.' But what he might have done, ought not to have entered into the question, if he had not really done it. It is clear, that the act 1449 supposes, that the rent specified in the tack is to be paid to the singular successor; and as the retainable sum was a part of that rent, as well as the surplus, there was no ground for rendering these clauses effectual, either as to the interest or principle of the debt. So the point was decided,

tional improvement, to that child of human vanity and feudalism, *the entail*. This act has not been attended with the effects proposed by it. Many estates cannot be taken under the conditions required ; others are incapable of inclosure. It is calculated only for the arable parts of Scotland, and not for wild, uneven, or extensive properties, which principally require improvement, and of which the greatest part of the country still consists. The conditions imposed upon the tacks exceeding nineteen years, bear no proportion to the advantage had by being limited to that term ; and the time allowed above such term, is not adequate in duration to these conditions. The building leases there provided for, are intended only for cottars or country villagers ; and they will answer no manufacture or improvements which require valuable structures.

All the leases we have mentioned, have the same sanction of the act 1449 ; but we are to remember, that there are leases which have not the aid of that statute. The first of this class, is that of tacks of estates already under tenantry ; for here the ground is already laboured, and nothing can be received, in virtue of the new tack, but the rents already fixed. They resemble the *feudae feudifermarum*, or feus of feu-duties, explained in a former lecture. By tenantry, nothing can be meant but such as are possessed under lease. These general tacks, however, have not been frequent of late years ; and the business of the receivers is certainly to remove the tenants, or to grant them subtacks, and if possible, by lengthening the subsisting under tacks, to prevail upon the tenants to accept of new tacks under the general lessee, which, it is presumed, would bring a right of this kind under the general statute 1449.

Tacks of dwelling-houses, and other subjects within burgh, being only given for the purpose of mere residence, are not supposed to fall under the act 1449, and consequently, are not good against singular successors. The custom of burghs, is always to let houses from year to year ; and tacks are not frequent, or necessary for improvement. Another reason is given why they do not affect singular successors :

a mere sight of the lease, or the information of the tenant ; he ought to make inquiry at the proprietor, with regard to the whole circumstances of the case, and particularly the state of the arrear at the time, for to these he subjects himself by the transaction *. On the other hand, the doer for the tacksman should remember, that the granting of the assignation does not liberate his employer, but that he remains liable for the rent, as if nothing had happened, and therefore he is to secure him against the danger, by every method which the situation of the parties can admit. Assignations to tacks, like tacks themselves, are preferable according to the possession had upon them ; and where that cannot be obtained, a process should be raised or intimation immediately made to the possessors, and every other method taken by which the conveyance may become known to all concerned.

The next supposition is, that of the tenant renouncing the tack, which, though it may be done in various methods, is generally executed by a deed in writing. This is a very simple deed, requiring no commentary. The only thing to be noticed, is the clause obliging the tenant to remove at the term. From Craig it appears, that written renunciations were in practice, even where the tenant meant to possess the term of his lease. This was owing to the great difficulty in removing tenants in these days, and to prevent the effects of tacit relocation, or that presumed consent to continue the contract upon the same terms, which is inferred from no warning being given at the end of the lease. At present, renunciations are never used but in the event of the tenant agreeing to give up the lease before the expiration of the term. In these cases, it will no doubt be safe to charge, upon the obligation to remove containing the renunciation, forty days before the term, according to the old form mentioned by Craig, and the analogy of the late act of sederunt.

The only remaining case is that of the tenant subsetting, which is
done

* Durie, 8th July 1626, Turnbull against Scott.

done by what we term *a sub tack*. A deed which requires all the legal solemnities of a principal tack. It recites the principal as its authority, and then lets and subsets, or sets in sub tack or assedation, for most part under additional terms, for the rent in a subset cannot be less than the principal. If it is so, the subtenant's property is always liable to the master for his full original demand. In these subsets, the rent is generally taken payable to the principal tenant, on purpose that he may discharge the proprietor, to whom he remains bound; and along with the sub tack there is always delivered, either the principal, or an extract of the first lease; because, in every question of possession with the heritors or others, the tacksman must instruct the right of the person under whom he does possess.

All the rules respecting principal tacks apply to subsets. As the sub tacksman is the proper tenant of the principal lessee, by consent of the heritor, in consequence of an express power for that purpose, the sub tacksman is at liberty to pay the rent to the principal, whose discharge will be to him sufficient, which, to the landlord, is one of the greatest inconveniencies attending subsetting.

We shall conclude the subject of the lease, by repeating an observation already made, that from the want of the English distinction of the chattels real in our law, a tack with regard to succession is a very anomalous right. When shorter than a liferent, it formerly fell under esheat, like a moveable; it is personal in its own nature, like a moveable; it is transmissible by assignment, and extinguished by simple renunciation. On the other hand, it descends to the heir, not to the executor: Like an heritable right, it can only be carried by adjudication; and yet all our lawyers are agreed, that it vests in the person of the heir without a service, at least the heir may continue his predecessor's possession. In the event, however, that the apparent heir was to assign the lease, he must, and indeed ought to serve heir in general, in order

to complete the right in the person of the assignee, otherwise such assignee will be entitled to possess no longer than the life of the granter, for the next apparent heir would then be entitled to the possession. This is still more necessary in the case of a liferent tack to a man and his heir; for if a service was omitted, the assignee might possess during the apparent heir's life, and then another heir, perhaps, serve to the first liferenter in the tack, which would extend it a full life beyond its original term. Where the tacksman is himself assignee, or an adjudger of the lease, we apprehend a general service is there also requisite, to connect what we may term a progress to the tack, and entitle the heir to maintain any question concerning the possession.

APPENDIX.

APPENDIX.

the Essay on the Removing of Tenants, referred to in Page 499 of this Volume, has become exceedingly scarce, it has been deemed proper to reprint it as an Appendix to this Edition. It was originally printed in an Octavo Volume, with the following Title. — A Discourse upon the Removing of Tenants, published to serve as a Specimen of the Lectures intended to be delivered upon the Practice of the Law of Scotland, by WALTER ROSS, W. S. Edinburgh, 1782.]

Removing of Tenants.

THE first act of property (says Sir Thomas Craig*) exercised by a purchaser of lands, or a vassal infeft, is to give warning to the whole tenants of his lands to move, unless they acknowledge him for their Master, and consent to hold their sessions thenceforth, upon such terms as he is pleased to impose: And thus ('*Sui vires undique exploret.*') he effectually tries the strength of his titles, against every other person pretending to any separate right, whether of property or possession.

At this period, lands were affected with a variety of incumbrances, which have since time vanished out of practice.—Besides the particulars known to us at present, there were then Hornings expired year and a day—Base infeftments clad with possession—Infeftments in ward-land, not confirmed—Expired Comprisings, and many others, which created trouble and expence to purchasers.

General Removing was, in those days, a method of discovering these latent evils. Now that their number is decreased, and the system of our Registers completed, action has given place to that of Reduction and Improbation, against every person, by the records, appears to have any kind of right.

Anterior (continues Craig) to the 1560†, the method of removing was this.—The Master came to the tenant's house, and verbally warned, or gave him notice, to remove at the ensuing term of Whitsunday. This done, he broke a *wooden platter*, or *at-dish*‡, into two parts—as a symbol of all agreement and connection being thenceforth at an end between the tenant and himself.

* *emigrando*, p. 1.

† should have been 1555.

‡ *rd Stair* calls it a Lance, and Mr. Erskine di-

minishes it to a Wand. The words used by Craig are *Lancem (ligneam, sive discum escarium)* not *Lanceam*.—*Lans* is a Dish or Platter—*Lancea* is Latin for a Lance.—I can find, therefore, no authority either for the Lance or the Wand.

The dish broken upon this occasion, must have appeared very significant.—The tenant was to *eat no more* of the produce of these lands.

‘ If the tenant did not willingly remove * upon the second day after Whitsunday, the Master forced him and his family out of the houses, and drove his cattle out of the fields; after which, the Master’s cattle were immediately put on. But, as it often happened that the tenant, unwilling to remove, and trusting to his friends, opposed force to force, whoever got the better in the fray, kept the possession.—If the Lord, therefore, found himself unable to remove his tenant, he had no other remedy but an action for the violent profits.’

The natural mode of recovery, either of moveables or land unjustly detained, is the lay hold of the one, when an opportunity offers; and to enter upon, and take possession of the other, by expelling the intruders. These were the methods of procuring justice in rude ages, and must take place at all periods, in degrees proportionable to the feebleness or strength of Civil Government. If the Laws of England and Scotland were at one period the same (a truth which may now be assumed as demonstrated) how did it happen, that the *removing of tenants* in the South, had, long before the fifteenth century, proceeded quietly, and according to established rules?—The enquiry is interesting: it must throw light upon the manners of the times in both nations, and supply the history of this part of Practice, about which our Writers have left us almost entirely in the dark.

The inhabitants of the whole island, for a long period, knew no other method than the natural ones I have mentioned. The antient Feudal Lords used very little ceremony with their vassals and tenants. When they chose to rid themselves of any of these dependents, they often did it by *force of arms*: and as to their villains, force was not necessary; the men and their possessions lay entirely at their mercy. The person who from weakness had suffered the injury, was obliged to apply to the Law (the Law is always the refuge of the weak) which allowed him a writ, *i. e.* an order from the King to the Sheriff, to try the complaint regarding his being forcibly deprived of the lands there mentioned. If it appeared that the person complained upon, had himself a preferable right to the lands, in that case, his attack upon the other was justified; if not, the complainer was restored by authority of the Prince.

When the *Roman Law* came to be studied in Britain, it suggested, That no subject in the peaceable possession of his property, ought to be deprived of that possession by private violence; and that, wherever this rule was infringed, the former possession should immediately be restored, without any regard to the point of right. In consequence of the *petitory* and *possessory actions* were adopted, and imitated.—Accordingly (as was taught by the English Lawyers) the *Assise of nouvelle disseisine* was introduced, in order to restore the possession, of which any person had been deprived. It was termed an Assise, from *assideo*, or the sitting together of Judges, the same as *Sederunt* with us, and *nouvelle disseisine*, from the recency of the wrong.—Lord Coke informs us, that the Judges held these *assises* at stated periods; and it was necessary that all the wrongs preceding that assise should be brought before it, otherwise they could not be heard. These were termed *ancient disseisines*; and those posterior to the assise, *nouvelle disseisines*.

All entries of private parties upon land, were appointed to be gone about in a year.

* P. 2. c. 4.

† The Ejection consequently was executed upon the third day after the time.

and quiet manner : * they sunk, therefore, into mere symbols, and writs were used to answer the various cases that occurred.—By virtue of these writs, every question regarding the possession of lands, came at last to be determined ; and, among others, the rights of proprietors and their tenants by leases, or, as the Law denominates them, *tenants for terms of years* ; and almost exactly by the same process, as if a lease had been a *real estate* in the person of the tenant. It was not a real estate ; but it was established by a deed equally formal, and containing the same clauses as a charter. The mode of trial which thus took place, greatly heightened the similitude. If a tenant refused to remove, the proprietor made an entry upon the land, and put him out.

If the tenant suffered this, and it happened to be wrongfully done, the tenant was then held to be *disseised*, and became entitled to the proper writ, in order to recover the possession.—If, on the other hand, he refused to move notwithstanding the writ, no force could be used : the Master was held to be *disseised* by his tenant, and could do no more than try his action as the Law directed.

Similar manners in Scotland produced similar remedies, and established the same law in every other right relating to property, but that of *tacks*.—Our ancient Laws were filled with regulations respecting the *nouvelle disseisine* :—we have the form of the writ, and procedure upon it :—we have all the cases and niceties of the action minutely pointed out in the old code. Still, however, these Laws did not all at once drive violence out of private hands.—Various cases occurred, to which the writ did not apply ; and, upon these occasions, the old *brevis manu* method was always revived.—To remedy this, Robert the First, in imitation of Laws made in England, extended the writ of *disseisine* to all other known cases : and having thus provided a legal remedy, he said, ‘ That whosoever shall be found to commit disseisine with *force and arms*, after the publication of this Statute, he shall be imprisoned, and pay to the King a great amercement, at the King’s will.’ †

These actions, at first, were not adequate to the evil, either in England, or in Scotland : they went no farther than the *possession* ; the question of right might afterwards be tried by the *breve de recto* ‡. The *nouvelle disseisine*, then, had the same effect as the posterior *process of ejection and intrusion*, i. e. the restitution of the possession to the person deprived of it by private violence. It restored the tenant, if unjustly deprived of his estate, in the lands ; and it restored the possession of the lands to the proprietor, if it happened to be illegally withheld by the tenant.

Small properties, such as *tenements within burgh*, these double actions proved difficult to the lieges.—To remedy this, we find, in the *Leges Burgorum*, a Statute of King Robert Bruce, made ‘ for help of the Poor against recent deforcement within burgh.’—Directing a plain and summary mode of process to be observed by the Magistrates, the Statute declares, ‘ That he against whom the Assise delivers, shall never afterwards be heard thereanent.’ This act further contains an enumeration of the different rights, of which people were usually disseised ; such as, *wadsets, liferents, annuities, &c.* In short, every act which disturbed a man’s possessions, or by which a possession happened to be withheld, became a kind of *civil wrong*, and was tried as such ; exactly as in England, where the forms, as we shall afterwards find, are still used in practice to this moment.

* 5. Richard II. cap. 8.

Stat. Robert I. cap. 12.

‡ According to the modern practice by the Declarator of Property.

In the very ancient cases of Ejectment amongst us, no instances are to be found one being brought by tenants upon leases for *term of years* *.—In England, contrary, such tenants were generally the plaintiffs in these actions.—The contrary in Scotland, appear always to have been *proprietors of the subjects* demanded; instance, which proves, that tenants for terms of years were either *little known* or, what is more probable, their leases were for a long time not considered of value or importance; and the holders, dejected by poverty and habitual idleness, were unable to procure themselves justice.—If, with some of our best Writers, we suppose the whole labourers of the earth to have been *villains*, or *bond-men*, a riotous, this circumstance will be perfectly accounted for.

Even when tenants, by a change of manners, arrived at some considerable estate, tacks came to be noticed by law, they were not allowed to have any rights of property: they were held to be mere *personal agreements*, of no consideration.—The brieves of deforcement had only been granted to persons *infefted*; and, therefore, it is extremely probable that the benefit of them was confined to tacksmen, who, according to the later ideas of the Scots investiture, were said to be *disseised*.—Till the Act, therefore, of James the Second 14, they were turned out of their possessions *manu forti*, and without any ceremony; the powers given to the Lords of Session some years afterwards, the spoliation and mailings is particularly committed to their cognisance †: and, from what is reported by Balfour, it appears, that even so late as 1549, a tenant forcibly ejected from his farm, had not an action against the ejector for being restored, if it happened to be a stranger or third party: it was found that such an action lay only *to the Master*. Laird of Durie *contra* Stephen Duddiston.

The rule is originally an English one. A tenant *ousted* or *disseised*, had no remedy, but an action for breach of contract against the ejector. But William Blackstone ‡, ‘If the ouster was committed by a mere stranger, ‘might, indeed, by a real action, recover possession of the freehold; but there was ‘no other remedy against the ejector, but in damages.’

Afterwards, the English Courts agreed in affording the tenant a complete remedy against all ejectors. They awarded both restitution of the land, and damages for the ouster, and that so early as the reign of Edward IV. *anno* 1461, or at farthest Henry VII. 1485 §.—But, from the decision of our Court just quoted, the old rule to have remained in Scotland.

The tenantry, deprived, for such a long time, of legal remedies, and treated at the pleasure of their Lords, began at last to feel their bad usage, and to acquire a degree of spirit from their numbers.—They ventured sometimes to *disseise* their lords, by intruding into their lands, or *retaining them against their will*. These instances produced cap. 78. of James II.’s 14th Parl. 1457, ‘*anent maisterfull* ‘*schaips* them to occupy, masterfully, Lord’s lands both spiritual and temporal.

The Lords, thus *deforced*, are ordered to apply to the ‘King’s Sheriff or Bailiff.

* Balfour indeed (p. 208.) mentions the form which a tenant by lease is to pursue for recovery of his possession and damages; and it is marked R. M. —But, from every circumstance, ‘tis evident that this form relates to the custom established in the time of the Jameses, which he meant to support by inference from the R. M.

† 14th Parl. c. 61. 1457.

‡ Vol. III, p. 200.

§ P. 201.

ask their ground to be devoided of the violent possessors, or to see what reason they pretend; and if the Sheriff finds no reason in the occupation of the ground, he shall devoid the ground *both of him and his goods*, and charge him, in the King's name, no further to disturb the proprietor.'

Here we have a very plain mode of Removing in James II.'s time; for the tenant *riding*, or the tenant *retaining a possession*, against the will of the Lord, was equally *enforcer or masterful man*.—The Statute is evidently a revival of the ancient process of *deforcement*. The party injured complains to the Sheriff of being dispossessed; the Sheriff, in virtue of this Statute, is authorised to take immediate trial of the matter, to eject the violent possessor, and to restore the lands to the owner.

This act, simple in its process, was soon forgot; it was made *in favour of the Lords*, of tenants; and these disdained to have recourse to it, when possessed of force enough to their own business.

In the succeeding ages, every thing between master and tenant appears to have been decided on altogether by private violence. Some decisions are preserved, which indicate that the tacksmen at times obtained justice, and were restored to their possessions, after being violently dispossessed from lands held by tack*. But, instances of redress are few, in proportion to the injuries received; and thus, left to themselves, and unprotected by the Law, despair often drove them to repel force by force.

One part of the ancient ceremony remained. The Master, as Craig mentions, before removing a tenant, *broke a dish* before his door, and commanded him to leave the lands. This was no other than the making an *entry*, which, till of late, was necessary to be done by every English landlord. The cutting down a tree, or any other symbolic act, is the warning in England, which a tenant-at-will got to remove. And the difference in the 15th century, was, that it was necessary for the English tenant to be ordered by the *sentence of a Judge*; whereas, in Scotland, the landlords did this business by their *own authority*. The original writs, whether taken out by the master or tenant, then bore, and still bear, the *disseisine*, or injury complained of, to have been done *vi et armis*. But in fact the violence remained no-where, but in the words of their process. The English, in this respect, were compleatly civilized; while Scotland had relapsed into absolute barbarism, and continued in it so very late as the 16th century.

James the Fifth awakened in some degree the spirit of the Commons.—By his zeal and success in the clearing the country of robbers and outlaws, one great source of their calamity was for the time closed up.—'The *rush-bushes were said to keep the title* †.—By his easy manners, the poor were encouraged to approach his person with their complaints. The moments of leisure which he had in his expeditions, he spent in hearing and protecting the lower class of people. His quarrels with the Nobles fostered this disposition; and, when dead, he was gratefully remembered under the title of *the Poor man's King*.

It was at this time, also, that the minds of the people began to ferment with religious notions. The Commons of Scotland, who for ages had tamely suffered every evil, civil and religious, which their superiors had been pleased to inflict, now ventured to ask a little for themselves. The extreme weakness of Government, and distractions of the Nobles, upon the accession of the infant Queen ‡, encouraged this rising spirit; the same arms which were to defend religion, seem to have been first brandished

* Balfour, p. 468.

† Hawthornden.

‡ Mary.

' Lords of Council, understandan that there is *great convocations* made
 ' for putting and laying men furth of their taks and steadinges ; and sicl
 ' to the Lords of the ground, their Baillies and Officiars, to lay them t
 ' *is occasion of great trouble and slaughter amongst our Sovereign Lord's l*
 ' fore, it is statute and ordained, That letters be directed to all Scherr
 ' Baillies, and to their Deputes, and to uther Officiars of the Queen's Sc
 ' part, to pass to the mercat-cross of the head-burrows of the schires, i
 ' open proclamation, command and charge all and sundrie our Sovereign
 ' of whatsomever degree they be, that nane of them take on hand to *ma*
 ' *cation* for putting and laying furth of any tenants ; bot that they, be
 ' and Officiars, lay furth the said tenants gudes orderly, conform to the
 ' realm observed and keeped in time bygane : Nor zit that na manner of t
 ' *ony convocation or gathering, for resistance to the Lords of the ground, i*
 ' Officiars, under the pains contained in the Acts of Parliament made
 ' that makes ony gadderings or convocations ; with certification to them
 ' the contrairie, that they sall be called at particular diets, and sall be p
 ' all rigour as accordis : And gif ony person thinkes them offended by o
 ' that they sall be called outhir criminally or civilly, and justice shall be
 ' as accordis.'

By this Statute, Craig's account of removing tenants in Scotland is m
 ified. The Lord Governor, there mentioned, was *James Earl of Arran*, a
 to the Crown, who had just wrested the regency from Cardinal Beaton.

This Statute, a mere prohibitory act of power, was intended to secu
 peace, without applying remedy to the evils which disturbed it.

Tenants had ofien good titles to retain their possessions : they had *un*
rentals, and other rights, to which their Masters often paid no regard. S
 tion was given to the threats of this unmeaning Act, that the common la
 many cases, the *resistance* of the tacksmen and their friends. Balfour
 decisions, not three years posterior in date, where the Judges determi
 ' person being in possession of lands, or other things, gif another attemp
 ' furth by *way of deed*, he may defend his own possession, *quia vim vi in*
 ' *pellere licet* ; and sicklike, it is leisume *for a man to assist his friend*, fo
 ' of his own possession.'—The intestine war, thus annually renewed, co
 waged for nine years longer, owing to the distraction of the times. At l

HAVING thus endeavoured to account for the singularity of our Removings preceding the reign of Mary, and to supply the history of that matter, I proceed to consider the Statute* which reduced it once more into order—

20th June 1555.

‘ It is statute and ordained, That, in all times coming, the warning of *all tennents*, and others, to flit and remove fra lands, milnes, fishings, and possessions whatsoever, shall be used in manner following: *That is to say, Lawful warning* being made ony time within the year, 40 days before the feast of Whitsunday, outhier personally, or at their dwelling-places, and at the ground of the lands; and an copie delivered to the wife or servandes, and, failzieing thereof, to be affixed upon the yettes or dures of the dwelling-places of the said lands, gif onie be; and thereafter, *the samen precept of warning* to be read in the parish-kirk where the lands lyis, upon an Sabbath-day, before noon, the time of preaching and prayer; and ane copie left and affixed upon the maist patent dure of the kirk, 40 days before the term; and na furdur laying foorth of stresses and removing upon Wednesday, to be used in time to come.’

What has been said, however, regarding the barbarous mode of our Removings anterior to this Statute, is to be understood in a more limited sense, than Craig, or any of our Systematic Writers, have described it. The *verbal warning*, and the summary removing, only took place, by law, between the *granter* of the tacks, or the proprietor of whom the possession was held, and the *possessor* holding of him, *i. e.* as the English term it, between *very Lord and very Tenant*. In most cases, where they were strangers to each other, deriving their property and possession from third parties, it was requisite that the tenant should be put out by the decree of a Judge, and by the Officers of the Law; at least if it was done by force, in the common way, that force was *illegal*. This is evident from the whole tract of decisions of these days, preserved by Balfour; and it is further very plain, that the Courts of Justice endeavoured to multiply the *number of these cases*.

Neither is it to be supposed, that methods of violence were agreeable to the dispositions of *all Landlords*, especially in those parts of the country, which, *comparatively speaking*, may be said to have been civilised. The words and conception of the Act now read, not only support this idea, but plainly indicate, that, by this time, the people were no strangers to the greatest part of the solemnities there mentioned. The Act does not set out by prescribing a *written precept*, and its execution, upon 40 days preceding Whitsunday, as our Lawyers alwise state it. On the contrary, it recapitulates the particulars of *lawful warning*, which are presumed to have been already in use, and appoints the continuance of them.—The words *lawful warning*, are used as synonymous to a *written precept* executed 40 days before the term, by delivering copies personally; or at the dwelling-place of the tenant.—This being done, as already practised, the Statute goes on to provide for circumstances: ‘ And, failing thereof, to be affixed, &c.’ *i. e.* If it cannot be served in the usual manner, let the copies be affixed upon the doors. ‘ And thereafter, the same precept of warning to be read, &c.’—But this is the *first time a precept* is mentioned: it was therefore clearly understood under the title of *Lawful Warning*; and the ceremonies at the church are the real additions to the former process, introduced by the Act. The proclamation thus ordered, served a double purpose: it rendered it impossible to surprise the tenant, and it gave notice to all and sundry that his farm was to let.

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* Parl. 6. cap. 39.

These proclamations, and notices, were not invented by our Lawyers upon this occasion: they were borrowed from the French, whose manners, forms, and laws, had become the *ton* of the times. When a French Lord seized into his own hands the heretage of his vassal or tenant, upon account of a failure in the performance of his service, or payment of his rent, the first step was to cause proclamation to be made at the parish-church, of the failure, and of his intention to seize the property, and expell the possessor. This was done on each of three consecutive Sundays, at the church-door, just after the saying of High Mass; and the execution of these proclamations (termed *Affiches*) were put upon the gate of the church, served upon the parties concerned at their dwelling-houses, and left upon the lands: And if, in 40 days after the last proclamation, satisfaction was not given, the Lord proceeded to have the property adjudged, re-united to his seignior, and the former possessor removed*.

The progress of the other parts of this business may also be easily and naturally traced.—It was impossible that the Lords of the ground could always go in person, to break the *disb* before the tenant's door, as Craig and Lord Stair tell us: they therefore were obliged to grant *precepts* to others to do it for them.

In the cases I have mentioned, where a decree of a Judge was necessary, it was requisite that these warnings should be *proved*; and consequently, *written precepts and executions* had often been indispensibly necessary.—Here is direct evidence of their existence. 'A tacksman in possession (says Balfour) may warn and remove, by his *own precept* allendarlie, and *without his Lord's precept*, his subtenant.—And, for this proposition, several decisions in the 1541 and 1542, are quoted, 13 years before the Statute in consideration.

Nor is the source of these new forms far to seek.—I have, upon a former occasion, shown you, that *wadsets* and *reversions* were among the oldest of our writs in Scotland.—The redemption of wadset-lands was nothing else but a warning, and a removing of the wadsetters; and so it is termed in all our Statutes, and in all our deeds relative to that business.—The Act 30th of the same Parliament of Queen Mary, 'anent warning *from redeemed lands*,' terms what has been since called *premonishing* the wadsetter, *the making lawful warning*. This was done from the earliest periods, by granting *written power, procuratory, or precept*, for that purpose; and the style of these, was, uniformly to *warn* and *charge* the wadsetters to come and receive their money. The same method was naturally adopted in the *warning of tenants*. Accordingly we find that the words *lawful warning* and *premonition* were synonymous, used equally in warnings and redemptions. Balf. p. 458. c. 11.

These forms suggested also the 40 days; for, from the earliest periods, 40 days happened to be the space fixed upon by our ancestors for *premonition*, and thence became a fashionable notice in almost *all national business*.—So early as Robert the first, goods pointed could not be sold for 40 days after the seizure.—Summonses in James I's time, were appointed to be raised upon 40 days *warning*†. When idle people were taken up by the Sheriffs, they were allowed 40 days to find masters; and when tenants wanted farms, practice pointed out the same space‡. The term of Whitsunday was also the customary term of removing, long before the Act 1555. A religious notion occasioned the mention of this matter in our Statute-book, at a time when the civil importance of it drew no attention.—In the reign of James III. the pointing of goods

* Craig, p. 295. § 36.
Coutume de Normandie, p. 139.
Traité de Crieé, par Le Maître.

† 14th Parl. c. 62. 1457.

‡ This space of 40 days appears common in the ancient customs both of Normandy and England.

rents, and the *incasting* and *outcasting* of tenants, are ordered to be deferred to the *third day* after the solemn feasts of Whitsunday and Martinmas. Here we have the reason of the *two days*, * for which the Old Removings were delayed, as mentioned by Craig; together with evidence, that they were executed *both at Whitsunday and Martinmas*.—Whitsunday came afterwards to be the established customary term for Removings all over Scotland. But, though Whitsunday was the usual or accustomed term for removing, it had not then become a *legal term*, to which Landlords were obliged to pay respect in the matter of removing. The Act of James III. just mentioned, is a proof that this business had sometimes been executed both at *Martinmas* and *Whitsunday*; and succeeding Statutes will discover a *large class of tenants*, who were ejected without the least regard to any particular time of the year. When *liferenters* died, and lands fell in ward, the *superior* and *fiars*, it seems, entered instantly upon the lands, and ejected the whole tenantry, whose tacks fell with the rights of their authors. But, by an Act of James IV. 1491 †, it is statuted, ‘ That these tenants of lands fallen in ward, the tenants of Lady terciers and liferenters, also the tenants under wadsets redeemed, or the possessors of land any other way, happening to be altered, shall remain unremoved till the next term of Whitsunday following, for payment of the former mails and duties.’—And, in conformity to this Act, another passed some little time before the Act anent warnings ‡.—I have already alluded to this Statute: it was intended for the benefit of reversers, who, having used the order against their wadsetters, could not recover possession of the lands. And it is provided, ‘ That the reversers cause *lawful warning* to be made to the occupiers of the ground, *before any Whitsunday term after the redemption*.’

The following decision is indeed compleat evidence, that the Judges had endeavoured to reduce Removings in general to due order, 20 years before the Act 1555; and that the rule at that time established, was only sanctified by the posterior Act.—‘ *Tacka relocatio*’ is (says Balfour) ‘ gif the Lord of the ground make not warning to the tenant at the term of *Whitsunday*, albeit the tenant have na tack; and therefore, an tenant being in possession as tenant of ony lands *closit within terms*, and not lawfully warnit before the feast of Whitsunday, may not be removit ay and while he be warnit theirfra.’ 3d December 1534. Balf. p. 208.

From these premises I conclude, 1st, That the Act 1555 did no more than add authority to known practices and customs. 2dly, That many Landlords paid no attention to these forms, neglected or disdained to give their tenants notice of their intentions, and surprised the poor people by a *sudden ejectment*.—Perhaps, indeed, the resistance met with in many parts, might have been a motive with Landlords to conceal their intention, and thus take the tenants unprepared. The anxiety with which the ceremonies are here prescribed, was in order to give certain notice of the Master’s intentions,—to remove the possibility of the tenant’s ignorance, and to give him a proper opportunity for providing for himself and family.—And, 3tio, That, for the public benefit, all removings in Scotland should thenceforth take place at the *single term of Whitsunday*, and cease at all other times.

To return to the Statute—The master having conducted himself as this law prescribes, and thereby become entitled to the immediate aid of the civil power in removing his tenant, is discharged from all further ‘ laying forth of stresses and removings upon Wednesday.’—These words alluded to a custom, which it seems prevailed, of

* The removing was executed upon the third day.

† Parl. 3. c. 26.

‡ Parl. 6. cap. 30

forcing the tenant, by way of *distress*, to remove his property, *i. e.* putting out and exposing some part of it, capable of receiving damage.—*Distress* was the antient method of compelling tenants to do every part of their duty : and, in England, it continues to be the method at this moment.—Distress, you may remember, is different from poinding.—The one is a seizure of a tenant's goods, in order to force him to make payment of the rent : the tenant is entitled to repledge, *i. e.* to get them back upon payment.—The other is the seizure of the goods themselves *in payment* ; and the execution is a discharge of the debt, to the extent of the poind.—The tenants were, it seems, forced, by *distress*, to remove from lands ; and, for that purpose, a part, or the whole of their goods, were laid out upon a Wednesday, *i. e.* the third day after Whitsunday.

— And gif the partie warned in manner foresaid remōvis not at the term, in that case, the warner sall, incontinent, or so soon as pleases him, cum to the Lords of Council, or to the Sherrif of the shire, or uther Judges Ordinares havand jurisdiction, schawand his precept of warning ordourly execute and indorsate ; and sall have letters or precept to charge the parties warned, and possessours of that ground, to appear before the saidis Lordis, Sherrifs, or their Deputes, or other Judges Ordinares foresaidis havand jurisdiction, upon six days warning or longer, at the will and desire of the persewar, to hear and see them decerned to remove, desist, and cease, conform to the precept of warning, and execution thereof ; or else, to schaw ane reasonable cause quhy they suld not do the samin ; with certification to them and they failie, that letters sall be direct *simpliciter* upon them in the said mater :—At the quhilk day, if they appear not, the Lords, Sherrifs, or other Judges Ordinar havand jurisdiction, sall decern them to remove, desist, and cease fra the lands ; and, gif they appear and instantly schaw sufficient title to bruike the lands, in that case the samin Judge to proceed and do justice as accordis of the law : and gif the partie compareth and shawis na thing, bot makis alleageance, and offers him to improve the indorsation, in that case he sall not be heard in judgment ; bot gif he find sufficient caution to the warner then instantlie, that gif his alleageance, being foundin relevant, be not sufficiently verified and prooven by him, that the profites, damage and interest quhilkis the said warner, or any uthers havand interest, hes susteened, or sall happen to susteen be the delay of the foresaid alleageance, be refounded to him : And to the effect that this ordour may have sufficient process in all tines to cum, it is advised, statute and ordained, That all Sherrifs, and other Judges Ordinar, havand jurisdiction as said is, be their selves, or their sufficient Deputes, be reddie to sitt, be fensed courtes, all the lauchfull fifteen days after immediately the feast of Trinity Sunday, for doing justice in the said causes, in manner above specified : And gif the Sherrifs or Judges Ordinares havand jurisdiction in maner foresaid, and their Deputes, failie to be reddie in granting of precepts, and doing of justice for observing of this ordour ; in that case, they sall pay to the partie, their hail damage, interest, and expenses ; but prejudice of the action against the violent occupiars and possessours forsaide.

And als, That na advocacion of causes be taken be the Lords fra the Judge Ordinar, except it be for deedlie feede, or the Sherriffe Principal, or the Judge Ordinar be partie, or the causes of the Lords of Council, and their Advocates, Scribes, and Members.

Sufficient provision being thus made, to procure notice to the tenant that he shall only be removed at a proper time of the year, the Act proceeds to secure the *public peace*, by disarming the parties, and transferring the whole business to the Civil Power.

The proprietor, if obedience be refused to his own precept, is entitled to have another from the Lords, or from the Sheriff.—The first is here termed *Letters of Summons*, and the second *Precept*.—The only difference between these and common summonses is, that the former calls the party upon *six* days, in place of the ordinary diet; and continues to be thence termed a *Privileged Summons*. It may be raised upon any other days the pursuer pleases, *exceeding six*.—The writs to be libelled on, are, the *titles* of the pursuer, the *precept of warning*, and *executions*.—The conclusion must be *in terms* of the precept; so that unless they happened to be properly drawn and executed, no removing could proceed.

Upon compearance of the party defender, he is to be heard upon all his defences, and is only bound to find caution in the event of putting the cause upon *improving*, i. e. proving the execution to be *false*. In resting the defence upon this point, the defender gives up all pretence to any *right* in the possession, and stands only on the ceremonies of the Act. As the presumption lies for the truth of the execution, he is appointed to *find caution* for the profits, damages, and interest to be suffered by delay. These have ever been the penalties consequent upon disseisin or forcible possession.—‘If the *laiser* (says the *Quon. Attach.**) deliver for the complainer, the damages and scaith which he sustained, shall be modified by his own oath.’ The possessions against this are termed *violent occupations*, and the damages have always been called *violent suits*; importing, not what were really got from the land, but what might have been got by it. The objections being repelled, the tenant is to be put out in virtue of *Letters of Ejection*, either from the Lords, or the Sheriff, as directed by the old Act of 1555, the Second, formerly noticed. To expedite the business, a particular diet is appointed to be held by the Judges Ordinary.—*They* are rendered answerable to the private parties for their conduct, and advocations from them discharged to be received.

All these things were ordered, that *force* (says Craig †) might thenceforth be prevented. By this Act, tranquillity was restored in an affair which seldom took place without noise, crowds, and disturbances.—The whole matter was transferred to the Ordinary Judges, who, after deliberating and hearing of the parties, decreed according to equity and justice.

No action (continues he) is with us more frequent, or more keenly debated. Much is always to be said on either side. The Landlord contends, that he may be at liberty to use his lands *at pleasure*. The tenant struggles to retain possession of a native spot, which he himself has enjoyed from infancy, and where his hoary ancestors lived and died.’

Lord Stair, and posterior Writers, have denominated the Act 1555, an *excellent law*. Tho’ Sir George M’Kenzie professedly wrote Observations upon our Statutes, he has not deigned to say any thing of this very interesting law: he only repeats a few circumstances from *Craig*; and adds two or three points of Practice, fixed by posterior decisions of the Court. One of these propositions is in the following words.—‘Because this Act ordains all warnings to be made forty days before Whitsunday, and speaks not of another term, therefore the warning must be made *before Whitsunday*, tho’ the person warned be not obliged to remove by his tack till the Martinmas; but execution must be suspended till then.’—In support of this, three decisions are cited. Lord Stair, Bankton, and Mr. Erskine, have repeated the same rule: And it has long been an established point in Practice, That where a tenant’s lease expires at

* Page 89.

† Page 269.

Martinmas or Candlemas, the precept of warning charges him to remove at those terms, but must be executed 40 days anterior to the *Whitsunday preceding*.

The learned, the ingenious, and animated Author of the Law Tracts, to whom in the course of these Lectures I have been so often indebted, has not judged this Statute below his notice.—An analysis of it, makes the 34th article of his *Elucidations*; and the scope of it is, to reverse the received proposition, and to establish, from the *tenor of this Act itself*, That a tenant may, in virtue thereof, be warned *40 days preceding any other term*, whether of Martinmas or Candlemas, at which the lease expires.—Venerating, as I do, the abilities of this respectable Author, it is with reluctance I find myself obliged to differ from him most materially in the construction of this important Statute. But, animated by a desire to pursue the same method of investigation, which his example has so ably taught, of founding Law on the basis of History, and thus ascending to the Principles of our ancient Statutes and Practices; the method of study which I have proposed to myself, has led me at times into an involuntary difference of opinion.—I have presumed, on this occasion, to dissent, not only from his Lordship's interpretation of this Statute, but from the construction put on it by Sir George M'Kenzie and Lord Stair, or rather by the Court of Session, upon whose decisions the opinion given by those eminent Lawyers is founded.

From the preceding deduction, and in support of what I have advanced, I am now to maintain, *first*, against the opinion of Lord Kaims, That the Legislature of Scotland, by the Act 1555, intended to put an end to all warnings and removings, *except at the term of Whitsunday allenary*. And, *secondly*, against the authority of the decisions founded on by Lord Stair and Sir George M'Kenzie, That, at whatever term or time of the year a written lease expires, the tenant, by the same Statute, ought not to be warned or removed till the Whitsunday following such expiration; and, consequently, that these decisions were deviations from the statute.

The question turns not upon *expediency* or *possible improvements*: it regards the *just interpretation* of this act at the time it was made, and which, according to Lord Kaims, has been mistaken by all our Writers.—I agree that it has been *mistaken*; and I am to show, that his Lordship's late idea, however reasonable in the abstract, *widens the mistake*.

The 34th article of the *Elucidations* sets out with informing us, That, as far back as can be traced, *Martinmas* appears to have been the term of entry and removing of tenants.

The act 1469, discharging poindings and outputting of tenants upon the holidays of Whitsunday and Martinmas, proves, that entries and removings were common upon both these terms, *at that period*. But (continues the ingenious Commentator) 'In the 16th century, and perhaps earlier, *Whitsunday* had become the term of removing.'—True, it was the customary, but it had not become the legal established term; and I have already mentioned a very numerous class of tenants, *viz.* those of liferenters deceased, those who held lands redeemed from wadsetters fallen in ward, transmitted by gift, sale, or other change, who had been accustomed to be removed or ejected immediately after the falling of their authors rights, and who, by special Acts of Parliament (one of them in the very same Session with the act 1555) were all protected in their possession till the Whitsunday ensuing.

Now, there were only three other kinds of tenants, whose removings remained to be regulated, *viz.* tenants by written leases—tenants by tacit relocation—and tenants possessing precariously, or at the will of their masters.—As to the *first* of these, holding

by leases, I shall speak to them afterwards.—From the decision before quoted, in 1534, it appears that the Courts of Law had already refused to allow the *second* class to be removed, but at the term of Whitsunday, and after lawful warning.—In another place, we are told also by Balfour*, That ‘*Tacita relocatio* endures ay and while lawful warning be made to the possessor, being in possession before *by virtue of an title*.’ 10th February 1552.

But the precarious possessor or the tenant, who *had no title* besides the tolerance or will of his master, might be, and no doubt was, ejected at pleasure, without regard to any term, or to any proper notice.—‘*Qui precario possidet, (says Craig) non expectato Pentecostes tempore aut denunciationis, quandocunque volet dominus, migrare cogetur; ita tamen ut aliquis æquitati locus sit.*’—So stood the Law of England, with regard to tenants-*at-will*, at the period we are talking of; and so we shall afterwards find it continues to this day, under certain modifications introduced by the Courts of Justice.

If, then, such a numerous class of tenants had, by a series of prior connected statutes, been positively secured against removing *at any other term* but Whitsunday, without regard to the period of the termination either of their own or their authors rights—If the Courts of Justice had bestowed the same privilege upon these possessing by *tacit relocation*—Was it not natural, was it not expedient, to put all tenants upon the same footing.—This was the very purpose of the Act 1555. The words, accordingly, are as express as words can be: ‘It is statuted and ordained, That, in *all times coming*, the warning of *all tenants and others* shall be in this manner, &c. &c.’ And an extraordinary diet of the Inferior Courts, is appointed to be held for fifteen days after Trinity-Sunday, ‘*in all times to come*.’

‘The time of warning (says Lord Kaims) is not regulated by the Statute, except where the removing *is at Whitsunday*.—There is nothing said in the Act, that the warning *must be 40 days* before Whitsunday, whatever *be the term of removing*.’—What could the Legislature do more than to ordain, that *all* warnings should precede Whitsunday, in *all time thereafter*? Is not that an express declaration, that, let tenants in Scotland enter as they might, they should only be warned, and consequently removed at or after Whitsunday?—I have just shewn, that, independent of this Act, the greatest part of the tenantry stood in that very predicament. That a tenant-at-will, or without lease, had properly no term, but the pleasure of his Master.—Admitting it, however, to be otherways, and that the time of the entry were to regulate that of the removing, it may asked, If the Act 1555, so requisite to the peace of all Scotland, might be eluded, by making conventional terms in verbal leases, different from that Act?—Were tenants, entering at Martinmas, or Candlemas, or May-day, to have no warning; but to be ejected *brevi manu*, in the old way?

Lord Kaims proceeds—‘We are not left to an argument from analogy.’—Balfour reports a case, *Lord Borthwick contra Syme*, in the following words: ‘In actions of removing of tenants, the warning is not sufficient, except there be forty free days between the warning and the term of Whitsunday or Martinmas, excluding not only the days of warning, but also the days of Whitsunday or Martinmas. In this case, but ten years after the Statute, we have the greatest Lawyer of his time laying it down as a rule, That warning must be forty days before the term, *whether Whitsunday or Martinmas*. That learned Author could not mistake the meaning of a Statute, which probably was framed by himself, undoubtedly with his concurrence.’

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Now, if this decision be really upon my side of the question, the arguments from analogy must disappear.

To bring it upon my side, I must supply a few words, which have been omitted by his Lordship in the quotation, *as of no importance*.—Thus it stands in Balfour: ‘ In actions of removing of tenants, and of redemption of lands, the warning is not sufficient, &c.’—As Whitsunday was the ordinary term for removing, so Martinmas had been the most usual term for redemption of lands. The question here, turned upon the forty days in the reversion, and the forty days allowed by the Act in the posterior removing. The Act of Mary, c. 30. concerning redemptions, and which immediately preceded the other about tenants, appoints lawful warning to be made previously to the redemption, conform to the reversion; and lawful warning to be again made to remove before any Whitsunday after the term.—Lord Borthwick, the reverser, had not given 40 free days, either in the one or the other warning; and the Lords found, That that space ought to have been given in both cases, exclusive of the term-days.—The decision, therefore, tends to establish the direct reverse of the proposition for which it is adduced. It proves, That the then late Statute concerning redemptions, was closely adhered to; and that, without respect to the date of such redemption, the wadsetter could not be warned or removed till Whitsunday following; which, in effect, was giving him an additional year’s possession of the arable lands.—If people, after this public law, did not conform to it, by making the term of conventional removals at Whitsunday, they knew the consequence. The agreement kept the tenant in till Martinmas or Candlemas, and the Law kept him till the Whitsunday following.—Such was the case with all the tenantry by verbal tacks.

TENANTS holding by written leases, stood upon a different and peculiar footing, completely exclusive of the new idea here combated.—By the Common Law of Scotland at that time, a tacksman could neither be warned, nor pursued to remove, during the existence of his lease. His knowledge of his own term, was held to be warning sufficient; and, till that expired, the Master had no right to make a single movement in the business: So soon as it was expired, he might have entered, and ejected him. This doctrine wears a novel appearance, merely because it has been long forgot.—It is, in fact, a remainder of the most antient Common Law; and it continues to be the Law of England at this moment. Here is authority not to be contested,—‘ Gif ony man (says Balfour) be perseud for removing fra lands, it is sufficient for him to allege and prove, that he had tacks to rin the time of the warning, suppose the same tacks be exspit and outrun during intenting of the action.’—28th June 1553. *Alecromby contra Ardross*.—This was two years before the Statute 1555.

Another decision, to the same purpose, is given 19th Dec. 1569, *Lord Ross contra Livingstone*, i. e. 14 years after it.—To the same rule of Common Law, Craig subscribes, at many years distance: * ‘ In his rentalibus seu assedationibus, sufficit, si tempore in quo denunciatio est facta, colonus tempus aliquod ex sua assedatione reliquum decurrendum habet, licet temporis, vel actionis, vel sententiæ, omnino tempus decursum fuerit.’

Tenants by lease, were, by the Statute, put on the same footing with all other tenants. The latter could not be warned, so long as the rights of their authors subsisted; and they could not be removed till the Whitsunday after these rights fell, at whatever term that happened.—Tenants by lease could not be warned by Common

was the method in Craig's time *, the delivery of a deed of renunciation, *ob majorem cautelam*, came afterwards into practice; and the instrument afforded proof of the Master's acceptance, in case there was no tack, or if that tack was expired; *i. e.* It prevented tacit relocation from taking place against the tenant.—The old warning or notice seems to have been more consonant to principle, than the posterior deed of renunciation; for, there was nothing in the tenant's person to renounce. He held, indeed, the possession: but, if he either had no tack, or if that tack was about to expire, he had no right to it; and therefore, a declaration of his intention to give up the possession when the term arrived, was as good as a warning by the Master, that it was to be taken from him.—At the same time, the reason of all this is plain, from the construction I have put upon the Statute. If it was a verbal lease, the Master could not remove the tenant, for want of a warning at his own instance; and if it was a written one, he neither could have warned or removed him at the ensuing term, without his own consent.—To make sure work, therefore, he took a formal deed of renunciation, 40 days before the expiration of the tack.

By the establishment of one term in the year, and *one only*, for removing, Whitsunday was rendered the general market-time of farms. All the *setters*, and all the *takers*, were put together at one time: which served to maintain a just equality between the parties; for, the true value of any thing is always best established when buyers and sellers are most numerous.

Lord Kaimes says, 'That our authors have given us no information about the cause of the preference of this term upon the occasion.'—'Whitsunday (says Lord Stair) is the competent term for taking lands, and providing fuel, which is ordinarily peats, to be cast and win about that time †.'—I cannot help being satisfied with this reason. The tenant entering at Whitsunday, gets immediate grass for his cattle, just when his Winter provision is consumed: the fuel, at the same time, is exhausted in his old possession. The Summer enables him to lay in a new stock of both.

Besides, corn-farms were formerly, and generally still are, let for so many *years and crops*: The tenants remove only from the houses and grass at Whitsunday; the corn continues to be their property. At Martinmas, the new tenant's barns remain empty, and the old one generally gets the advantage of them for managing and storing the crop which belongs to him.—This civility and mutual accommodation had become common even in Craig's time.—After describing the voluntary removing I have mentioned, he adds, 'Scio tamen hoc tenentibus indulgeri *plerisque locis*, postquam satis segetes a solo separaverint, ut eas in loca priora, ubi solitæ erant antea servari, congerant; sed hoc potius *ex gratia* concedi puto, quam ex juris rigore.'

'may pretend to have, any manner of way, to the occupation of the town and lands of ———, possessed by me in virtue of a tack from C. D. dated the ——— day of ———, which ceases and expires at the term of Whitsunday next, and that to and in favours of the said C. D. heritable proprietor thereof, and his heirs; with power to him, by his tenants, servants, subtenants, and others in his name, peaceably to enter thereto at the said feast and term of Whitsunday next; and to occupy, labour, set, use, and dispose thereupon, in all time coming thereafter.—*Likeas*, I grant myself, wife, bairns, servants, family, subtenants, goods and gear, lawfully and orderly removed

'therefrom at the said term of Whitsunday next, but any warning or decreet of removing: And binds and obliges me and my foresaids, to sit, redd, and remove myself, and my above written, furth and frae my occupation of the said lands, biggings, yeards, and pertinents thereof, at the said term; and to warrant thir presents at all hands, and against all deadly.'

* Sivi dominus denunciaverit, sivi colonus se migraturum declaraverit, p. 86. cap. 4.

† Page 643. cap. 7.

No other term of the year is attended with such plain advantages ; and therefore, the wisdom of our ancestors, in fixing upon Whitsunday for the business of warning and removing, must, according to my humble apprehension, stand unimpeached.

Having thus, with a diffidence only to be felt, offered a new analysis of this Statute, or rather attempted to restore its original meaning, I go on to examine our *present practice*, which, tho' not so wide a stretch as that which has been spoke to, is still a *deviation* of great importance.

From the tract of decisions posterior to the 1555, it is evident that all persons conformed to the term thereby prescribed ; so that the original purview of the Statute came to be forgot.—At last, about 50 years afterwards, the Landlord, in a lease, which, for some particular reason, had been made to expire in September, warned the tenant to remove 40 days before the preceding Whitsunday ; and, after that term, he sued the tacksman to remove at the expiration of the lease in September.—The counsel for the tenant pleaded, ' That neither the warning, nor the action, could be sustained, being made before the term of the expiring tack ; *before the expiring whereof*, he could not be warned, far less could action of removing have been intended against him, until the tack *had been ended*.'—The Lords sustained the warning made before the ish of the tack, to the effect, that, after the ish, he might seek his removing, and pursue the same.—The *ratio* given by the Court is this : ' If warning should not be made till the Whitsunday following after the tack, the defender might bruick the lands a year longer than he had right, for the old tack-duty, *which were unequitable*.' Currie, 8th July 1626. *Foulis*.

This is the decision upon which the opinion of Sir George M'Kenzie is rested, and by which our Practice has ever since been regulated.

As the Law then stood, it appears to have been an erroneous decision.—The tenant's defence was a *good one*, founded both upon the Common and Statute Law of the kingdom. In place of attending to what the Act of Parliament *had ordained*, the Court set the Common Law entirely aside, and fixed their attention upon what, in their opinion, the Statute *ought to have been*.

If the Law of the land gave the tacksman another year's possession, Was it equity to take it from him? What right in equity had wadsetters, and the other class of tenants I have mentioned, to a year's possession at the old rates, after their *titles were no more*, especially when these rates were often small in proportion to the value of the lands? and yet they could not then, and cannot now, be deprived of this advantage. Leversers, Fiars, &c. &c. cannot prevent this advantage from being taken of themselves. So what they will, the possession of the tenants of liferenters, wadsetters, &c. will, in most cases, outlive the title of their Authors for a year ; whereas Landlords, knowing the effect of the Statute, could, at any time thereafter, shorten their term, *i. e.* let only 19 years, where 20 were intended*, or make their account with what was to happen from the beginning of their bargain. Thus, for the sake of that equity which they did not reach, the Judges broke the uniformity of the terms established by the Act 1555, and, sapping the well-constructed fabric of an Act of Parliament, gave rise to a number of difficulties, which have since perplexed this branch of business.

Practitioners were not long of taking the hint thus given them : they altered their récépts, and charged the tenants to remove at *Martinmas* or *Candlemas* expressly, and

* Though this is not the *original reason* of nine- probably the reason of its being continued in practice. ten years being the common space in tacks, it was

executed them 40 days before Whitsunday preceding*. The Common Law was again opposed in vain, and the diligence sustained, *Inglis* against *tenants*, 16th December 1628, *Durie*. And this decision fixed the opinion of our Lawyers, and has directed our Practice in this circumstance ever since.—Encouraged by these determinations, a party, some time after, tried a warning directly before Candlemas; but this attempt was defeated. 15th June 1631, *Ramsay* against *Weir*.

Lord Kaims, in consequence of his argument, is obliged to declare, That Sir George M'Kenzie, Lord Stair, &c. have made a rash inference from those judgments; and that the opinion common in all our Law-books upon this matter, has no support from these decisions.—'Two of them (says his Lordship†) are not to the purpose, and the last is a lame authority.

'The objection made to the warning in the first, was *childish*, when the very purpose of a warning is to notify to the tenant that he was to remove at Whitsunday‡. And the Court, in place of finding, did not even insinuate that it was their opinion, that warning must be before Whitsunday, when the removing is at Martinmas, or any other term.'—But I have already shown, that the objection was not the *conceit of a Lawyer*;—it was the Common Law of Scotland, which had subsisted for ages, and stood declared to be so by Balfour and Craig.

As to the decisions, I cannot conceive any thing of the kind to be more directly in point. Let the first suffice as an example§.—The tack expired in September: the Master warned before the Whitsunday preceding, and brought his action against the tenant, to remove at the expiration. The Lords sustained the warning, tho' anterior to the ish, and for this express reason, That 'if the warning should not be made before the Whitsunday following, *the tenant might brook a year longer than he had right*.' Now, this decision is dated 8th July: And, if the Lords had not been *determinately of opinion*, that warnings ought to precede the term of Whitsunday, without regard to all other conventional terms, they would never have sustained this absurd warning||;—they would have recommended to the pursuer to execute another warning, for which there was abundance of time *between the 8th of July and September*, when the tack in question expired. But, according to the *ratio* of the decision, the warning *already made* must have been sustained; because no other could be executed till the Whitsunday following, which would *have deprived the Landlord of a year's possession of his farm*.—In this sense Lord Kaims formerly understood it; for, thus the decision stands abridged in the Dictionary: 'At whatever term the tack runs out, warning must be made forty days before the preceding term of Whitsunday.'—Hence I venture to conclude, That the opinion of M'Kenzie, Stair, M'Dowal, and Erskine, is *just*, and not erroneous, since it is founded upon these decisions.—The error lies in the decisions themselves.

The learned Elucidator discerns great inconveniency in this part of our Practice.—'A warning (says he) seven or eight months before the term, is no indication of what the Landlord's mind will be when the term approaches; and, hoping a change of mind, the tenant forbears to seek for another farm. Much experience has taught us

* Sometimes the precepts warned the tenants to remove at Whitsunday, at least at the real term of expiration.

† Page 287.

‡ 1626, *Foulis*.

§ *Durie*, p. 211.

|| The warning had been made to remove at the Whitsunday, though the tack did not expire till September:—The effect was proposed to be suspended till that time.

at 40 days is a proper space ; and there is no prospect, that, in so short a time, the landlord will change his mind.'

On this notion I cannot help refusing assent ; and I refuse it with a degree of confidence, because it will be found diametrically opposite to the wisdom of our Legislature, I am certain it does not quadrate with the experience I have had from practice and observation. All the Acts of Parliament I have spoken to point at the warning year ; and the last one, 1555, recommends it ' only time within the year, 40 days before the term.'—If we admit the observation to be true, What is to be said of the 1579, which preserves a simple warning for *three years*? or of the Act 1669, which is to cut off a mere summons of removing in less than *ten years*?—Parliament have been wonderfully mistaken in its ideas of this matter ; and time, in place of 40, must have magnified the error.

Those who have seen tenants *suddenly warned* from dwellings, to which long possessed and riveted their affection—who have heard their simple feelings burst out in expressions of nature, will never believe that they forget or become indifferent to a charge of this kind—

' En queis consevimus agros !' *Virg.*

When the Master is resolved, the sooner he gives notice to his tenants, so much the better. They have then time to look around, and are not driven to accept of any conditions, or of any farms, from the shortness of the time.—What would be the condition of husbandmen in this country, if their Masters were to give them no other warning, but the old 40 days of Law?—No man, as matters are now managed, warns tenants, before he has agreed with others to succeed them. If he continues silent the exact 40 days, what chance have the outgoing tenants to get other farms, when every inch of land all around them is already agreed for?—By this very circumstance, numbers of industrious families have been reduced to misery. The late mode of extensive farms, grass-grounds, &c. &c. often leaves nothing in the market. A tenant by lease, indeed, is not in so much danger. He knows the term, and generally provides for it ; but it is a hardship to which all others are exposed, and from which I hope Humanity will protect them, since the Law does not.

I have had the misfortune to differ from the learned Elucidator, upon every circumstance of the subject before us, let it not be imputed to a vain affectation of imagining singular opinions. No more has been attempted, than to defend the antient law—I have had the great advantage of being guided by his judgment and knowledge through many intricate parts of my present laborious undertaking ; and I am happy to glean materials under the flambeau of his genius.

ENDING, then, given my reasons at large for presuming to teach any thing different so great a man, I return to my historical account of this subject, which stopt at a Court of Session authorising warnings made against tenants, whose tacks expired at Martinmas, or other terms, to remove at the expiration of these terms, in place of Whitsunday following, which I have shown to be the genuine purport of the Act. At the time of the decisions we have mentioned, and during the greatest part of the century, a remainder of the old law subsisted.—No process for removing could be obtained until the term arrived, and the tenant actually refused to remove. The 1555 does not appoint a Court of Removing to be held till after Trinity-Sunday,

at Whitsunday yearly.—So long as the Sheriffs, and other inferior judges, did their duty at this Court, no inconvenience could be felt, but what was unavoidable in the business. This, however, appears in many places to have been neglected; which forced proprietors to bring their actions before the Court of Session, and then a very great evil no doubt disclosed itself.—The summons was to be raised, and every thing to be done, *after the term*:—the incoming tenant was disappointed—a greater evil, in Lord Kaimes's opinion, than any that was remedied by the Act 1555.

Had the mischief been either great or general, it would have been sooner remedied; but we hear little of it till Nov. 1671*, when a process happened to be raised before the term, against the possessor (not of a farm, but) of a soap-work. The defender stated the objection upon the Act 1555. The answer was, 'That the Act related not to *prædia urbana*;' which the Lords sustained.—This is the decision upon which Lord Stair grounds his opinion, that actions of removing may be raised *before the term*. It is repeated by Mr. Erskine; and, though plainly not to the purpose, as reported by Lord Stair himself, it is the foundation of our present practice of raising actions of removing against tenants, long before the expiration of their leases, and obtaining decreets ready for execution at the term, which, as a method of much expediency, is now finally established.—No other instance occurred till about ten years afterwards, when a Decreet of Removing in a rural tenement, pronounced before the term, was sustained. June 16th, *Lady Chatto contra tenants*.—Fountainhall says, that some of the Judges hesitated upon this decision. 'Tenants (they observed) were favourable in Law (as appears by many of our Acts of Parliament) and were not to be so strictly used; and that the anticipation was contrary to the analogy of the Law.'

Lord Kaimes informs us, that the Commissioners appointed by Oliver Cromwel, were the first who thought of a remedy to this evil.—'They allowed Summons of Removing, before the Supreme Judges, to be raised at any time after the warning, to be executed on 21 days, providing the day of comparance be six days after the term.'

This was an alteration made with great deference to the Common and Statute Law of the country; for, no man could be brought, by the Statute 1555, sooner into Court, than *six days after the term*.—Struck by this circumstance, Lord Kaimes observes, 'That it was but half a remedy, or rather no remedy at all.'—If I am not much mistaken, it was an evil of a different nature, which the Commissioners meant to remedy. Oliver's people were not apt to give orders without *meaning*, or to act without *effect*. Sheriffs had become negligent, and parties chose to bring their Actions of Removing before the Supreme Court: but Precepts of Warning, and Executions, were to be transmitted to Edinburgh; and the Summons was to be raised and executed in the country; and returned, *all after the term*—a circumstance which must have consumed time, in proportion to the distance of the place, and difficulty of communication. No more was intended by this order, than to put it in the power of parties to have every thing as ready before the Superior Court at Edinburgh, *upon the day of comparance*, as they could have had before the Sheriff in the country.—In this view, the order is sensible and useful: in any other, it is *not so*.—When the Court of Session was restored, the inconvenience returned with double force. The Court did not sit till June. Here what Lord Stair proposes:—'Albeit Removings be in the roll of causes that are *usually* marily discussed, yet, the term falling *in the vacance*, this great inconvenience follows, that the warning cannot be made effectual *at the term*; and therefore, warning

* Riddell.

may be made in the beginning of January, that the removing may be discussed before the end of February *.

Religion, as you have heard, occasioned the first statutory notice of the matter of removing in the reign of James II. ; so now, in the 1644, the reign of the Presbyterians, the same principle gave rise to another regulation.—The keeping of the Sabbath, as termed in a strict Judicial acceptation, was the characteristic of the Presbyterians at that time. The Act 1555 appointed warnings to be read in the church during the time of Divine Service, which it seems was often literally performed. This gave of-

to the Saints of the 1644 ; and therefore, an Act of their Parliament passed †, obliging warnings, and other executions of the law, to be read, till the Minister had added the sermon, and said the blessing ; and, ever since, they have been read at church-door, as nobody would stay in the church to hear them. Mr Erskine, there-

fore, erroneously tells us, that this alteration of the Forms came in by *immemorial custom*. The term of *Whitsunday* being one of the moveable feasts of the church, varied

year in the circle of the Ecclesiastical Calendar.—This circumstance, in the civil way of removing, was attended with many inconveniences : It occasioned mistakes

in calculation of the forty days, and, consequently, a number of unnecessary dis-

—By encroaching too far upon the Summer, it gave improper advantages to the

ing, or, as we say, the *outgoing tenants*.—These inconveniencies were removed

in 39. of the 2d Sess. 1st Parl. of William and Mary. Our Sovereign Lord and Lady, and the estates of Parliament, considering the in-

conveniency arising from the uncertainty of the term of Whitsunday, whereby the

variance of the two ordinary terms of Whitsunday and Martinmas is so unequal,

Whitsunday oft-times reaching far in Summer, by the removing from lands at

that time, these who remove do eat up and destroy the meadows and hained ground :
Remedied whereof, their Majesties, with consent of the said Estates of Parliament,

do statute and ordain, That the Summer and Winter Terms shall, in all time coming,

be the Fifteenth day of May, and Martinmas ; and that the legal term of removing,

shall in burgh and land-ward, shall be the said Fifteenth day of May, upon warning

of forty days preceding the same.'

Thus concludes our Statute Laws regarding the *Removal of Tenants*.

Now come now to consider the *Practical Order*, and the *Writings necessary in the*

process.

The first step is, to prepare a *precept of warning*.—It is called a *precept* ; because,

directed to an inferior officer, that officer does not represent the person of the

heretor, but acts by his command. Precepts are issued only by those who have the

power in their persons.

The right to remove the tenant is in the heretor, by his infeftments ; and no title is

vested in the tenant, to remain. The precept is an act of exercise of that jurisdic-

tion inherent in the heretor ; and therefore, the style imitates the letters of the *King*

or *Judges*.—For the proprietors of lands were Princes in their own territories ; and

the member imitated the manner and style of his Superior, from the lowest rank of

the feudal scale, to the Sovereign himself,

St Martin has not thought this writ of consequence enough to be admitted into

Part II.

3 X

* Page 646.

† Cap. 14.

his system of Forms, I shall take it from Spottiswood, p. 65.—the style being everywhere the same *.

‘ A. heritable proprietor of the lands and others after described. To
 executor hereof.’

The precepts of warning were always directed, and are yet directed, to the lowest officer of the barony or other jurisdiction: and it might have been directed to any persons; ‘ Quidlibet enim (says Craig) ad id munus sufficit.’

‘ It is my will, and I require you.’

Here is the great style.—The King can only say, ‘ *Our will is, and We command you.*’—It is these words that give the title to the writ. A procurator, you may remember, is a representative of his constituent:—he is *made* and *constituted*:—he acts in his name; it supposes ability for that purpose: and, though the Act of resignation of lands be ministerial, yet it would have been an insult, had the vassal appointed a mean person to perform an act of reverence to his Superior. In giving sasine, the proprietor rises in importance, and appears as a Superior himself. He gives, therefore, a *precept*, and *commands* his Bailie to execute the business.

‘ Ye pass, *forty days* preceding the term of Whitsunday.’

One of the first questions moved upon the Statute 1555, regarded the forty days, *i.e.* whether they were free or not; and it was found that the warning is not lawful, unless there be forty *free days* betwixt the term of warning and the term of Whitsunday, excluding not only the day of warning, but also the term of Whitsunday itself. 19th May 1565, *Lord Borthwick* †. In February 1715, the Lords dispensed with this rule, and decerned in a Removing, altho’ the 40 days were not free—a decision which it is presumed will not be repeated ‡.

In cases where more than one term of entry is mentioned in the lease, such as Can-

* *Precept of Warning.*

‘ A. Heritable proprietor of the lands and others under written, to ————— executors hereof, conjunctly and severally, greeting.—It is my will, and I desire you, that incontinent this my precept seen, ye pass, forty days preceding the term of Whitsunday next to come, and lawfully warn, conform to the Act of Parliament made concerning warning of tenants to remove from lands, the persons after named, pretended tenants, and others under written, viz. (*Here insert the names of the tenants, and of the lands, as in the tacks, or in the heretors rights*) to flitt and remove themselves, their wives, bairns, families, servants, subtenants, cottars, goods and gear, forth and from the said lands and others above written, with the pertinents; and to desist and cease from them, and leave the same void and reidd at the said term of Whitsunday next to come; each of the said persons for their own parts, so far as they occupy thereof; to the effect that I, my tenants, servants, and others in my name, may enter thereto, peaceably

bruik, joice, occupy, labour, and manure, set, use, and dispose thereupon as my heritage, at my pleasure, in time coming, conform to my indentment, and sasine thereof; and that ye use the whole permanent order of warning against the forenamed persons, for removing from —————, and others above specified, prescribed by the Acts of Parliament made thereanent: Certifying them, if they do in the contrary, and continue to occupy, labour, and possess the lands and others foresaid, after the said term of Whitsunday next to come, they shall be holden and reputed violent possessors thereof, and compelled to make payment of the violent profits of the same, with all rigour.—According to justice, as ye shall answer to me thereupon. The which to do, I commit to you conjunctly and severally my officers in that part, full power by this my precept (written by ———) and subscribed by me, &c. ———.’

† Balfour, p. 457.

‡ *Duchess of Buccleugh against Davidson.*

as for the grass, and Whitsunday for the houses, the precept must be executed 40 days before the Whitsunday preceding the first term so specified. Feb. 14. 1765. *Taughton contra Wilson.*

tenants happening to be out of the kingdom, an objection was made, that 40 days warning were not in that case sufficient—an erroneous idea, arising from the analogy of a summons. A warning is now nothing more than a notice or intimation requisite to a summons. A private person has no power to give notice at the market-pier and shore; and the Act 1555 gives him no such authority: But the summons of removing consequent upon the warning, must be upon the long *inducia*. The objection was, notwithstanding, sustained with some difficulty, needless doubts having been entertained by some of the Judges about it*. It may be upon 60 days, in place of that can do no hurt.—Warnings have been objected to, and sustained without proclamation at the market-cross, pier and shore. 18th January 1612. *Archbishop Andrew's* against *Lord Roxburgh*.

To make sure work, however; upon such occasions, practitioners applied the ordinary remedy, of *Letters in supplement of the warning*.—These letters you will find in *Martin*. After reciting that the heritor had subscribed a warning, they proceed thus: 'And in respect A. B. and C. D. two of the tenants, are presently furth of the kingdom, and so cannot be warned in virtue of the said precept: Therefore command, that ye pass, 60 days before the term of Whitsunday next, to market-cross, pier and shore, and, in supplement of the said precept, lawfully warn and charge you, &c.' According to these forms, it is impossible to remove a tenant for that year, unless the warning and removing are executed, and the action proceeded in, several months before the term of removing.

To conform to the Act of Parliament made concerning warning of tenants to remove from lands.

This clause became necessary after the Act 1555, the heritor having no title to warn in any other manner.

'Pretended tenants and possessors.'

The word *pretended*, is alwise used by Formalists, in writs calculated to quarrel with the rights of others. In some of them, it is proper, because their titles are regarded as *void* from the beginning.—In the precept of warning, it is *improper*; because there could be no use for the writ, unless the parties warned were *truly* in possession, or tenants at the time. It should be, 'Present tenants and possessors.'

To flit and remove themselves, their wives, bairns, servants, families, subtenants, and goods and gear.'

In this enumeration, the *cattle*, &c. are omitted, unless we suppose them comprehended under 'goods and gear.'

The words *bairns* and *gear*, though now almost forgotten among the English, are original Saxon words, and used by the best Old Writers, as peculiar to rural affairs.

* *Milton*—

I shall appear some harmless villager,
Whom thrift keeps up about his *country gear*.'

8 X 2

* Lord Stair, 10th Feb. 1666. *M'Braes* against *Creditors*.

SUBTENANTS.—The Tenant is warned to remove the subtenants, because *their* right depends upon *his*; and, as Craig says, they ought to know that it is their duty to remove along with him, tho' they should not be mentioned in the warning.—But the reverse will not hold. The warning of the subtenant will not remove the principal, even tho' the former should be in the natural possession.—The reason is given by the same Author: 'It would be unjust that those who had no right or possession from the pursuer, should be obliged to remove at his instance, if the persons from whom they derived right, and whose proper tenants they are, had not been warned, and an opportunity given them of defending their own possession.—For this reason (continues he) most people are careful, not only to warn the *natural possessors*, but also all others from whom any of them derived right to the possession.—The Lords vary in their decisions upon the necessity of this; but, in my opinion, it is clear, that no subtenants can be removed, without warning the principals, from whom possession has been derived.'

Cottars are still more dependent upon the Principal Tenants, and considered as *a part of their families*. I formerly explained to you the word *Cottar**, and gave you an account of that class of people.

'From the said lands, with the pertinents; and to desist and cease therefrom.'—To *leave* and *depart from* the same, would be better words; yet the former, being the words of the Act 1555, must be retained.—By *pertinents*, our Judges seem to have understood byres, barns, stables, and out-houses. When tenants remove at Martinmas or Candlemas, their out-houses, as already mentioned, are often allowed to remain in their possession, for the preservation of their corn and cattle, till the entry of the new possessor.

'Leave the same *void* and *redd*.'—These words carried an important signification. Parties disputing the property, often bribed the outgoing tenants to admit them quietly into possession. 'This (says Craig) is not to be born: the tenant cannot be suffered, thus, by fraud or collusion, to invert the possession of his Master.' An attempt of the kind was tried so late as the 1713: but the Lords found, 'That the decret was not fulfilled by the tenant's removal, when, by collusion with him, another steps into the possession; but he must deliver, or leave it *void and redd*. 21st July 1713, *Budge contra Sinclair*.'

'That I, my servants, &c. may peaceably bruike, joyce, and dispose thereupon.'—*Bruik* is a Saxon word for *using*, bearing, or enjoying. *Joyce* is from the French word *jouir*, to enjoy. Both are now almost obsolete even with us.

'Conform to my infeftment and sasine.'—This is improperly expressed: it should be conform to my *charter and sasine*, or conform to my infeftments, which include both, for the sasine is only *part of the infeftment*. A purchaser must therefore be infeft, before he can remove tenants; for they are not bound to take notice of any personal rights: and the sasine, at least, must be produced as the title in the action of removing. Tho' it is held, that, in a question with tenants who have no real right to oppose, a sasine is sufficient, yet the charter, to avoid objection, should always accompany it.—Mr Erskine seems to be of opinion, that a *habeas disposition* ought to be held as a good title in removing tenants who have no better right to produce.—'A disposition (says he †, p. 274.) would not entitle the heretor to remove the tenants by

* Frequent reference is made to Lectures intended to be delivered.

† Lord Bankton and Mr Erskine imagined, that

Barons and other Land-holders possessing territorial jurisdiction, might have removed tenants by the decree of their own Court; because the Act 1555, in this

of his own Court; but, by Common Law, he seems to be entitled to bring it the Sheriff, in consequence of his property, especially as the disposition carries right to the mails and duties, or, in other words, to the rent.' Common Law is a word very common in our books, but it is often difficult to know what the writer means by it.—Anterior to the Statute 1555, there was no such rule established, or practice known. That Act supposes a compleat right in the person of the heretor, who takes the benefit of it; and it obliges him to use real execution, by putting a copy upon the lands for all third parties having or pretending any real right. Now, how could this be done by the holder of a bare disposition? How could he by acts, *quæ prædia tangunt*, as the Lawyers express it, without a right in the lands themselves? A second disposition, with a prior infeftment, might cut him out of his right to the property forever. A personal disposition carries mails and duties, in consequence of any right established in the person of the disponee, but as an exception of the right remaining in the granter, who may assign his rents as he pleases, in disposing his lands.—I have remarked upon the style of the precept, that it is out of jurisdiction; and the holders of personal rights, it is admitted, have no right to the exercise of any thing of that nature. Hence it is, that an heretor must be warned the time he uses his warning, otherways it is null, as issued *a non habente potestatem*. The only exceptions to this rule, are where the heretor derives right by *terce*, *power*; and by *courtesy*, if he be the husband of an heiress. The reason is, that such proprietors rest upon the sasine of the heiress or the husband, and need not investiture to compleat their right.—The next is the case of an apparent warning upon apparency, and compleating his infeftment before the warning. Apparency is, in law, held to be a title of possession in many cases; and, in others, it is held sufficient to support a warning, if infeftment follows; because posterior titles have a retrospect to those of the ancestors, join with them, and make a legal continuity: they make the heir, in the law phrase, *una et eadem persona cum defuncto*.—This point was determined in the time of Craig. 'Our manners (says that Author) differ much from those of our ancestors. They positively require, that, both at the date of the warning and removing, the warner should be the *luminus*.'

The tenants derive their right from the user of the warning; it is consonant to law and common sense, that they should not be allowed to inquire into, or to dispute that right. Their own possession depends upon it; and, therefore, they must be in the order of their Master.—'Non enim ferendus est colonus (says Craig) qui non a quo causam possessionis habet, de jure ejusdem possessionis velit contentiosus ut ab eo possessionem acceperat, et ei restituere cogendus est.' The tenants upon precepts of *clare constat*, are common titles in removings, though their sufficiency is much doubted by Stair, and the doubt repeated by Mr Erskine. The law now assigned is, That unless the immediate ancestor of the person infeft had had possession, his title imports nothing more than the assertion of a superior.

Courts of Session, and Sheriffs, Magistrates, and Judges Ordinar having jurisdiction.

The purpose of the Act, was to take the execution of this business out of the hands of the Master, and place it in that of other Judges. The warner is now required to come to these Judges, showing his warning orderly executed and indorsed,

'and to take letters from them.'—A vassal, therefore, of a Baron, might, under this salvo, apply to him; but, if the Baron was the warner, it is plain, from the words and purview of the Act, that he could not apply to himself. Had the Statute allowed this, it would have effected nothing.

‘ And that ye use the whole remanent order, &c. &c.’

This general direction relative to the Statute 1555, is preferable to the other form of making it special, and repeating the direction of the Act.—The shorter the writ is, the less handle it affords of committing error.—The heretor ordains every thing to be done according to law, and gives ground for a presumption that it was accordingly done, when the contrary does not appear from the execution.

‘ Certifying them that they are to be held as violent possessors.’—This does not appear to be precisely authorised by the Act. The certification of the Act is, ‘ That they shall be decerned to remove by order of the Judges Ordinary.’—‘ And letters direct *simpliciter* upon them in the said matter,’ *i. e.* That letters of ejection should immediately be issued against them.—This is also the certification even of the summons.

‘ According to Justice, &c.’—This conclusion is copied from the King’s letters: it is the language of authority, which all landholders in this country conceived themselves to be possessed of.

The precept being then a kind of judicial *writ*, does not fall under the Stamp Act. It must, however, be subscribed before witnesses, with all the formalities of private deeds.

In executing this warrant, the officer may either begin with the ceremony at the church, or he may serve it upon the tenant. He ought to read the precept, and then deliver him a kind of schedule, with us termed a *short copy*.

‘ I ——— Officer in that part specially constitute, by the Precept of Warning after mentioned, directed to me by A. heritable proprietor of the lands of ——— conform to the said Principal Precept signed by him of date the 27th March 1764 years, do hereby, and by virtue hereof, warn you to flit and remove yourself, wife, bairns, family, servants, subtenants, cottars, goods and gear, furth and from (*here the lands are inserted as in the precept*) and to leave the same void and redd at the term of Whitsunday next to come; to the effect that the said A. as heretor thereof, his tenants, servants, and others in his name, may enter peaceably thereto at the said term; with certification in manner mentioned in the said principal precept of warning. This I give you upon the 28th day of March 1782 years, before these witnesses.’—

After having left another upon the lands, and gone through the solemnities prescribed at the church, he returns an execution, which we will next consider—

‘ Upon the ——— day of ——— 1764, I ——— Officer in that part specially constitute, by virtue of the within-written Precept of Warning, passed to the dwelling-house of the within-designed F. present tenant and possessor of the lands of ——— and also to the ground of the said lands, and lawfully warned, conform to the Act of Parliament made anent warning of tenants to remove from lands in all points, the said F. to flit and remove himself, his wife, bairns, family, servants, subtenants, cottars, corns, cattle, goods and gear, furth and from the said lands, with the pertinents and houses, and yards and others thereto belonging; and to leave the same void and redd at the term of Whitsunday next to come, to the effect the within-designed A. and his tenants, and others in their names, may enter thereto, and peaceably possess, bruik, occupy, and labour the same at their pleasure: —And also, upon the ——— day of ——— and year foresaid, being Sunday, I passed to the parish-kirk of ——— within which parish the said lands lie; and at the most patent door thereof, at the dismissing of the congregation from the forenoon’s sermon, after crying of three several oyeses, I read and made public int-

mation of the within precept, in audience of the parishioners convened thereat for the time, and made certification as is within expressed. This I did conform to the said principal precept in all points, whereof I delivered a just copy, signed by me, to the said F. personally apprehended; and I affixed and left the like copy upon the grounds of the said lands, upon the day of that none pretend ignorance of the same; all which copies did bear and contain the respective dates hereof, and the witnesses names and designations present at the hail premises, *viz.* at the dwelling-house, and upon the ground of the said lands M. and T. and at the church-door I. and G.; and, for the more verification of this my execution, the same is subscribed by me and the said witnesses.'

'*I delivered a just copy.*'—The short copy is called a just one, because it recites the precept, and is regulated by it.—There is a material difference between just or short copies, and full ones. In treating of the execution of summonses, you will be completely informed upon this article. Suffice it to mention at present, that very long after the Act 1555, the service of all writs was made by delivering schedules containing the principal circumstances of the matter.—This method has been retained in some cases, and altered in others, by Acts of Sederunt.—Precepts of Warning are among the former.

'*I affixed and left the like copy upon the lands.*'—The method of affixing this copy is, by putting it into the cleft of a stick, and this stick upright into the ground.

The same piece of form, as we shall afterwards more particularly learn, is used in real execution; and the purpose is to give notice to all subtenants, or other persons interested in the property. It is therefore required to be done separately from the notification to the tenant himself; and without it, the warning is null.—So the Court have more than once found.

If the tenant does not remove, the next thing to be done is to expedite, or (as we say) raise a summons of removing, either before the Lords, or the Judge Ordinary*. The proprietor first states his titles to the lands; then the precept of warning, and executions. The lybel next charges, that the term of Whitsunday is past, and that the tenant notwithstanding refuses to remove. The tenants are warned upon six days to hear themselves decerned to flit, &c. St. Martin adds, 'That this summons requires no second diet, *because all is instructed by writ.*' He had a better reason to give, *viz.* That it proceeds upon the Act of Parliament 1555, which appoints only one citation upon six days.

At the time this eminent Conveyancer collected his Forms, the mode of suing the action of removing before the term, was little known or noticed, otherwise we should have here found a note upon that subject. Accordingly you have heard, that the point rests upon no more than two decisions, at ten years distance from each other.

Supposing the decree of removing to be obtained, the term arrived, and the tenant continuing, or, as the English say, *holding over*, he is no doubt to be ejected by the hand of the law.—Let us then consider the practical mode of carrying this into execution.

The Sheriff, immediately after decret, issued his precept of Ejection, which was executed in 24 hours, if the tenant did not move.—That time (*de praxi*) was given as reasonable space for the removal, and no more. You will here call to remembrance, that no execution upon any decree, even for payment of debt, ever required a previous charge, when the person of the debtor was not to be affected; and that *poindings* fol-

* St Martin, p 201.

lowed both by law and practice in that manner, before the Act 1669, appointing previous charges to be given.

The ejectment of possessors decreed to remove, needed no previous charge. It immediately followed the decree; nor was a charge consonant to the nature of the thing, which required the utmost dispatch.—After the 1669, however, Charges upon Decrees of Removing, were, it seems, introduced from a *false analogy*. The point came to be tried in a few years after, when the Lords, with great propriety, found that the Act 1669 extended only to *poindings*, and sustained the ejectment without a previous charge*. Notwithstanding this pointed and sensible decision, charges upon decrees of removing, even of Inferior Judges, crept in from the ignorance and timidity of practitioners, and added greatly to the embarrassment of the business. Craig and Stair take no notice of this circumstance, because the first never supposed any such thing, and the error was not conspicuous at the time of Lord Stair's publication, though he reports the judgment I have mentioned. The Act 1669 excepts 'all decreets recovered at the instance of heritors against their tenants, in their own Courts; and therefore (says Sir George M^cKenzie) it has been doubted whether tenants may be removed and ejected without a previous charge†. And though (continues he) upon decreets before the Lords, previous charges are necessary; yet, upon decrees of removing before Inferior Courts, it is the custom to eject immediately: and though this may seem hard, yet it is necessary, because the inrant tenant must remove immediately, and so must have a place to which he may remove; *et sibi imputet* the tenant, who, being warned, did not provide himself timeously‡.—Here indeed it may be said *Aliquando bonus dormitat Homerus*. If such a necessity existed for the immediate removing of tenants decreed to quit their possessions by Inferior Judges, did not the same necessity operate against those decreed by the Lords?—or, had Inferior Judges a complete remedy in their power, which the Supreme Court had not?—In the only case where the question had occurred, the Lords found that the Act 1669 related to poindings only. No charge was necessary before that time in any case; and, therefore, no charge could be necessary upon their own decreets, since the date of the Act.—After all, Lord Bankton thus doubtfully expresses his opinion: 'Though, in strict law, Letters of Ejection may be executed without a previous warning, yet the safest course is to use it, as is ordinarily practised, on six days charge.'

The true reason of this difference between the practice of the Superior and Inferior Courts, is to be found in the nature of the diligence issued by the Court of Session, which always consisted of *Letters of Horning*. This circumstance not only gave rise to the previous charge, but it inverted the very nature of decrees of removing, when pronounced by the Lords of Session; and, in place of an expeditious diligence, it rendered them, in point of procedure, one of the heaviest and most operose executions known in the law.—

1st, The tenants are to be charged, in virtue of letters of horning, to remove in six days: 2^d, They are to be denounced rebels, and the horning registered: and, 3rd, Both decree and horning must be produced, with a bill praying for letters of ejection, directed to the Sheriff; and, upon these letters, the Sheriffs were charged to remove the tenants in six days more.—St Martin || gives us the style of a horning upon a de-

* 30th June 1675, *Lady Stainhill against Burd*.

† Obs. on the Act 1669.

‡ Because the removings were always obtained before other Judges, and not in the Baron Courts.

|| P. 460.

ree obtained before the Sheriff. This horning charges the tenants to remove in *six days*; and, to explain that circumstance, he adds a note in these words: 'Since it is said formerly, that in all hornings before Inferior Judges, decreets are to be on *15 days*, why not this?—*The answer is clear*, The removings are privileged, being *peremptory*.—Some (continues St Martin) raise captions after the tenants are charged, denounced, and registrated at the horn; and others do not give themselves the trouble, but raise letters of ejection directed to the Sheriff.'

The Writers to the Signet have, in this business, acted upon the false analogy already mentioned: and St Martin's answer, here given, is by no means *a clear or a good one*. The error is not difficult to discover; it is only directing the view to a leading feature in the Practice of the Law of Scotland.—Our ancestors knew of no compulsator against the persons of the subjects, but by involving them in rebellion: Hence, *Letters of Horning and Denunciation* will be found to be the constant executorials of all decrees, whether they be issued for payment of sums, or *ad facta prestanda*. Now, tenants were not the only people to be removed by the hand of the Law.—Powerful heretors possessed of lands which had been controverted,—wadsetters of lands fairly redeemed, and many others of the higher classes, were to be forced to give up their possessions. In these cases, the hereditary Sheriffs were often unwilling to act, sometimes unable; far less could any thing be done by Sheriffs *in that part*. The Supreme Power then became necessary; and, on purpose to have that aid, Letters of Horning were applied for, in order that the obstinate possessor might be denounced *Rebel*.—Letters of Ejection were next issued against them in that character; and if they, after all, ventured to deforce the Officers of the Law, they became guilty, at once, of both *civil* and *actual rebellion*. The matter was laid before the Privy Council, who issued the barbarous commission of a weak Government—the *Letters of Fire and Sword*!—The Horning being once established as the executorial of the Court in removings, continued to be applied for against simple tenants.—In St Martin's time, the practice had been common: 'Some people (says he) did not give themselves the trouble of ejecting the tenants, but followed the ordinary course of captions, &c.'—This, to us, appears strange; but the surprise ceases, when we recollect the effect of *Civil Rebellion*. In most cases, it must have proved an effectual compulsator; but it evidently led the Writers to the Signet into error. It was necessary that a denunciation of rebellion should be preceded by a charge; and this necessity riveted the superfluous practice of giving a charge upon decreets of removing. As the charge was a work of supererogation, the six days might be sufficient; but this could be no reason for giving *hornings* upon six days. And the reason mentioned by St Martin, that removings were privileged, is a bad one. The summons only was privileged; but a man ought not to have been denounced Rebel upon fewer than the stated *inducia* of fifteen*.—There was no law for making him a rebel, for refusing to remove *nine days* sooner than in any other case. It was no less an absurdity to make a horning and denunciation the necessary warrant of Letters of Ejection in common cases, where no capital resistance was expected. If a Sheriff issued Letters of Ejection upon his own decreet *simpliciter*, was it not evident that the Court of Session could do the same, either in aid of that Sheriff's decree, or their own? and yet these unnecessary forms have been servilely kept up from St Martin's time, and are to be found in all our Chamber Style-Books at this moment.

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* Fifteen days were the common *inducia*.

Writers have seldom any objection to accumulate *Letters* upon *Letters*, and *Charge* upon *Charge*; but, in place of correcting, Lawyers have sanctified this clumsy procedure.—In our latest system, we are told, ‘ That if a tenant shall refuse to give obedience to a Decree of Removing, *notwithstanding a Charge given upon Letters of Horning*, the obtainer of the decree may procure Letters of Ejection from the Signet, directed to the Sheriff, who is required to dispossess him. *But if the decree be pronounced by the Sheriff*, he himself may grant a Precept of Ejection, directed to his own officer, for the same purpose *.’

The Sheriff, according to this authority, can do what the Lords of Session cannot; and yet the act 1555 is most express upon the point.—The heretor is directed to apply, either to the Lords, or to the Sheriff, for the summons.—These Judges are authorised to decern the possessors to cease, remove, and desist from the lands; ‘ with certification to them, if they faillie, that Letters shall be directed *simpliciter* upon ‘ them in the said matter,’ *i. e.* *Letters of Ejection*.—The Sheriffs have retained this power: The Lords, it seems, have (*de praxi*) lost it in the manner I have described.

The Letters of Ejection we have in Dallas; † and they accordingly recite the Decree, the Horning, the Denunciation, and Registration.—They subsume, ‘ That, ‘ notwithstanding thereof, the persons most contemptuously continue in the possession.’—The execution of the Ejection is properly committed to the Sheriff, or his deutes: It was an original part of his duty, by our ancient law; and it continues to be so in England still.—He is directed to remove the former possessors, and to introduce the complainer, and those in his right, with all the solemnities usual in the like cases.—St Martin then informs us, ‘ That the Sheriff, or his deutes, give obedience, ‘ or he appoints a messenger his deute in that part:’—And, ‘ That Letters of Ejection ‘ were afterwards directed to messengers, as sheriffs in that part; so that Sheriffs, or ‘ their officers, were seldom troubled in this business, excepting when the Ejection ‘ proceeded upon their own warrant.’

The solemnities upon this occasion are these: The messenger, with a person as procurator for the Master, properly attended, repairs to the tenant’s houses, thrusts the people he finds out of the door, and the cattle out of the byres, stables, &c. drives them to the high road, extinguishes the fires, locks the doors, and delivers the keys to the proprietor, or his attorney.

It is not the practice, in this case, to return *any execution*; for no person is presumed to have a remaining interest in removing, as in the matter of poinding, where the debtor is entitled to a schedule of his effects for his discharge, and to quarrel the valuations. The remedy of the tenant, if wronged in removal, is an action of ejection and damages; and therefore it is usual to have a notary attending, to take instruments in his hands upon the order of the proceedings, and to make a list of the particulars ejected ‡. When extended, it is termed ‘ *An Instrument of Ejection*,’ and signed by the notary and messenger.

The former possessors being removed, the next solemnities regarded the introduction of the bearer of the Letters of Ejection. The Messenger or Sheriff delivered him the stilts of a plough; after which, he himself, or servants, plowed a ridge or two; and as

* Erskine, p. 692. § 17.

† Page 462.

‡ This list prevents all after-allegances of new goods being on the spot, or in the houses, than really were found there.

ment upon the *res gesta* was taken, called an *Instrument of Possession*.—These instruments were sometimes taken and extended separately *.

Being thus discussed the Removing upon the Act 1555, I shall add a few Cases occurring upon it, which the Forms did not give an opportunity of remarking.

Of the earliest questions moved upon that Statute, was, Whether the heirs or predecessors could avail themselves of warnings used by their deceased predecessors?—Objections were accordingly made upon that head, and repelled †.

The greater part of the disputes in this business, have regarded the titles of the user warning. It is not competent to tacksmen, unless their leases were either for lives, or contained an express power to input and output tenants, or at least were not in the actual receipt of the rents from the subtenants.

A proprietor warns his tenant, and then sells his lands, he may assign the warning to his successor: but that successor must be infeft before he can use it; for, after the proprietor is denuded, he can insist in the removing; and unless the titles of the purchaser be compleat, he cannot make use of the warning given by his predecessor. The remedy, in these cases, is to bring the action of removing at the instance of both;

§ Y 2

Instrument of Ejection and Possession.

‘ At

which day, &c. compeared personally upon the lands of A. B. and with him C. sheriff and sheriff in that part specially constituting in his hands Our Sovereign Lord's writ of ejection, direct at the instance of the said A. B. against D. pretended tenant and occupier of the lands, commanding and charging all sheriffs-at-arms and sheriffs in that part, to be present in his Majesty's name and authority, to eject the said D. and his wife, bairns, and from the lands and others foresaid, and the pertinents, and to enter the said A. B. his servants, and others in his name, to the actual and void possession thereof, and to hold, and assist them therein, as the said letters bearing date, &c. more fully bears: And then the said M. taking in his hands the said writ being desired by the said A. to proceed in execution of his office in the premisses, conform to the tenor of the samen in all points, did, in and thereto, pass to the dwelling-house of D. F. upon the ground of the said lands, ejected and outputted the said D. F. his wife, &c. tenants, &c. together with the contents of household furniture, conform to a list or inventory thereof made in the order of the same, subscribed by the said C. the sheriff above mentioned, and the witnesses above named, to which reference is hereby made *breve*; and thereafter the said C. extinguished the fire in the house, locked the doors, and delivered the keys thereof to the said A. B. heretor,

‘ and thereby entered the said A. his servants, and others in his name, to the peaceable possession thereof, conform to the tenor of the said letters of writ of ejection, laws and practise of this realm, in all points. *Lastly*, Upon all and sundry the premisses the said A. B. asked and took instruments, &c.’

Instrument taken upon the Possession of Lands, given by a Sheriff in obedience to Letters of Ejection and Possession.

‘ At the day of

‘ The which day, compeared personally, an honourable person A. B. Sheriff-depute of the sheriffdom of Edinburgh, and passed with me and the witnesses after mentioned, to the ground of the lands of C. D. formerly possessed by C. D.; and, at command of the letters within specified, and in obedience thereunto, entered E. F. personally present, to the possession and occupation of the several lands after specified, and that by deliverance to him of the streiked plough by the stils thereof, and certain furs were tilled therewith; and the said A. B. the Sheriff protested, that he had fulfilled the command of the said letters: Whereupon the said E. F. to whom possession had been given, asked and took instruments, and swore, in the hands of me Notary Public. These things were so done, &c.’

This last Form was used in the cases where disputed lands, lands wadsetted, &c. were decreed to be restored to the reversers, or proper owners.

† Balfour, p. 457.

and then, as Craig advises, ' Mutuus utriusque tam cedentis quam cessionarii consensus concurrit.'

Notwithstanding the great alteration in the manners of the people, and the prevalence of ordinary learning among the lower ranks (I mean reading and writing) since the beginning of this century; yet it proved a matter of great difficulty, to get a warning executed free of error. Formerly, when messengers and lower officers could do little more than sign their names, they acted under the inspection of others more knowing, and had their executions made out, or carefully perused. But when they judged themselves able to act without assistance, errors for some time multiplied exceedingly. The matter of removing tenants, in particular, became uncertain and expensive—in so much that instances, in remote parts of the country, have occurred, where possessions had been retained for years successively, and, after all, the tenants have yielded only upon compromise.

At the period of the Act 1555, it appeared of little consequence to the Public, whether the Master changed his tenants or not, provided it was brought about in peace. There was no great difference, in knowledge or industry, between the new and the old tenant. Improvements were not in fashion, or in the expectation of parties.—A different spirit at last inspired both the Master and the tenant—Improvement of the land, with a number of proprietors, became the point in view—A rise of rent (no matter how) with others. Possessors, who kept themselves in their farms by law, had no mercy upon the soil. In short, it appeared to the nation, that the simplifying the business of removing tenants, had become requisite to the commerce of farms, and advancement of agriculture.

Independent of the method chalked out by the Act 1555, there were several grounds for the removal of tenants at common law; some of which have been noticed in the Lecture upon leases, others fall under the present subject.—These were termed *summary*, in contradistinction to the *solemn* removing we have been considering. These summary actions the Lords of Session were undoubtedly entitled to regulate, by their own authority. The Court, however, took the *whole business* under their consideration, and, in December 1756, issued the well-known *Act of Sederunt anent removing of tenants*.

No ordinance of the Lords of Session ever created so many doubts, murmurings, and reflections, as this one has done, both with regard to the authority of enacting it, and the matter enacted.—I shall, therefore, with freedom, and I hope without offence, analyze the regulations thus introduced, and candidly state the complaints against them, so far as my knowledge or information will permit me.

Dec. 14. 1756.

Preamble
of the Act.

' WHEREAS the difficulties that have occurred in actions of removing from lands, have been found highly prejudicial to Agriculture, and both to Masters and Tenants, in respect that, during the dependence of such actions, the lands are neglected and deteriorated by the defender, and the heretor's security for his rent brought into danger; and tenants are discouraged from entering into tacks, by the uncertainty of attaining to possession, and by their finding the subject of their tack much deteriorate, during the dependence of the process of removing against the preceding tenant—The Lords of Council and Session, resolving to remedy this great evil, do make the following regulations: *imo*, That where a tenant is bound by his tack to remove without warning at the issue or determination of his tack, it shall be lawful to the heretor, or other setter of the tack, upon such obligation, to obtain Letters of Hor-

ing, and thereupon to charge the tenant with Horning 40 days preceding the term of Whitsunday in the year in which his tack is to determine, or 40 days preceding any other term of Whitsunday thereafter: and, upon production of such tack, and horning duly executed, to the Deputy Sheriff, or Stewart, or their substitutes, of the shire or stewartry where the lands lie, they are hereby authorised and required, within six days after the term of removal appointed by the tack, to eject such tenant, and to deliver the possession void to the setter, or those having right from him.'

This clause concerns conventional agreements only: it is therefore by all agreed to within the power of the Lords, especially since they had been accustomed to judge these clauses, as not under the purview of the Act 1555; and yet this very regulation proceeds upon the contrary idea. It is plain, that the Court has, in this place, Lord Stair the honour of exalting his opinion into Law.—'The Statute for warning (says he) is a public Act, introduced for the good of poor tenants, whose rusticity is excusable, if they advert not to anterior pactions; *nam pacta privatorum non derogant jure communi*. Yet, on the contrary, *cuicunque libet, renunciare juri pro se introducto*; betwixt which I conceive this temperament will hold, that such pactions may be effectual at the precise time, if sufficient intimation be given to the tenant to provide for himself.—And I suppose that they will walk most fairly and safely, who will intimate the same to the tenant.'

This appears to be a very sound opinion; for, if tenants are allowed to renounce the legal warning or due notice, the condition will soon be imposed upon them; the very hardships and disorder remedied by the Act 1555, might be in some degree revived.

The clause authorises a charge, not only at the term of Whitsunday, where the tack expires at Whitsunday, but preceding any other term of Whitsunday thereafter. This is upon the idea of what is in law termed *tacit relocation*, i. e. a relocation or second lease in the same terms with the former, presumed from the silence or acquiescence of the proprietor in not warning his tenant to remove. The years possessed under this lease are considered to be a continuation of the terms in the written lease, because the thing continues to be thereby regulated between the parties; and therefore it is reasonable and just, that the obligation to remove should also continue in force, as this clause directs. And hence we now have the exact value or import of the obligations to remove contained in tacks, and which, since the date of this Act of Sederunt, are seldom or never omitted.

Upon expiration of the lease, any new verbal bargain takes place between the tenant and the Master, which alters the terms of the former one in any article, I apprehend that the clause we are talking of would from that moment lose its force, and that the charge of horning would be of no effect; because, by the supervening agreement, the tacit relocation entirely ceased.

The Horning authorised by this Act, passes upon a bill, with which the lease is produced, either registered or not. The bill prays for Letters of Horning, for charging the tenant to remove in terms of the Act of Sederunt of their Lordships *made anent Reclamations*. The tenant is charged to remove at the ensuing Whitsunday, in the words of the obligatory clause, from which the words of the horning should be taken.

When the term of Whitsunday arrives, the charger produces his executed horning, and a petition to the Sheriff, praying for his warrant to eject the tenant *. It is ac-

* A petition is seldom given in upon this occasion; the horning only is produced, which is not a considerable practice.

cordingly granted, and executed in the manner I have formerly laid before you. This is the very method prescribed by the old Act of Parliament against violent possessors; and it differs from the Act 1555, in this material point, That, in place of a Summons of Removing, which by that Act the Sheriff was bound to give, he must in this case issue *an immediate Warrant of Ejection* *.

Supposing the Master, in this case, not to apply to the Sheriff, but to the Court of Session, What compulsitor would the Court decree; Letters of Ejection, certainly. But the warrant must be *a special one*, upon a petition; for the Writers to the Signet could give nothing but a caption upon such a horning.—The Act of Sederunt gives no power to go further; and Letters of Ejection can only follow upon the Act 1555, with which this kind of removing has no relation.

The tenant cannot be heard upon any objections he may have, before the Judge Ordinary, who is here ministerial: his only method is, to suspend the charge of horning. If his objections are good, he will present his bill *immediately* after removing; if otherwise, he will delay to the last, which never fails to afford a presumption against him.

2d Clause
of the Act.

‘ WHERE the tenant hath not obliged himself to remove without warning, in such a case it shall be lawful to the heretor, or other setter of the tack, in his option, either to use the order prescribed by the Act of Parliament made in the year 1555, intituled *Act anent the Warning of Tenants*, and thereupon pursue a warning and ejection, or to bring his action of removing against the tenant before the Judge Ordinary: and such action being called before the Judge Ordinary, at least 40 days before the term of Whitsunday, shall be held as equal to a warning execute in terms of the foresaid Act: And the Judge shall thereupon proceed to determine in the removing in the terms of that Act, in the same manner as if a warning had been executed in terms of the foresaid Act of Parliament.’

It is this clause of the Act, which has chiefly created the doubts with regard to the powers of the Court.—The Act 1555, it is said, was a solemn Statute of the Legislature of our country, in daily observance; and it is argued, That the Lords of Session had not a title to *alter*, much less to *repeal* it.—On the other hand, it has been answered, That the Act was not repealed—an option being left to the subject to follow the method therein prescribed, if judged proper.—The Act of Parliament, it is observ-

* *Form of a Precept of Removing and Ejection, contained in Decrees pronounced by the Sheriffs.*

‘ Ordains the officers of the said sheriffdom to charge the said A. B. to flitt and remove himself, wife, bairns, family, subtenants, servants, cottars, and dependers, goods and gear, furth and from the said (Here the subjects in the decerniture are repeated) and to leave the same void and redd at the said term of Whitsunday next, to the end the said C. D. pursuer, or others in his name, may then enter thereto, and peaceably possess and enjoy the same in all time coming, and that within 48 hours after the said term of Whitsunday next [if the charge to remove be given before the term; or within 48 hours next after the charge, in case the same is not given after the term of Whitsunday] under the pain of ejection; wherein if the said A. B. defender fail,

‘ that the said officers eject, remove, and put forth the said defender and his wife, bairns, family, servants, subtenants, and cottars and dependers, goods and gear, furth and from the said subjects (Here repeat them) and keep, hold, and detain them furth thereof; and enter and possess the said C. D. pursuer, or others in his name, therein; and maintain, uphold, and defend them in the peaceable possession thereof; and to cause inventory of the haill goods and gear so to be ejected; and, if needful, to make gates and doors open and patent, and use his Majesty’s key for that effect; and also to do and observe the haill remanent order anent removings prescribed by the Act of Parliament; and also ordains precepts, and all other executions needful, to pass and be direct hereon in form as effeirs.’

d in reply, ordains, That *in all times thereafter, the warning of all tenants and others* should be *in the manner thereby appointed*. Accordingly it was, for two centuries, followed by the subjects; and explained by the Courts of Law, to the absolute exclusion of all other methods of removing. That this clause of the Act of Sederunt dispenses with the Statute: but a dispensing power is lodged in no Court of Britain—not in the sovereign himself. The very term was proscribed at the Revolution, and prerogative was denied all relation to it ever since *.—Further, it is said, That the Act of Sederunt does more than *dispense*, it introduces a form altogether different, and is therefore *a direct repeal* of the Act of Parliament:—that the expediency of any law ought not, among a free people, to supply its want of authority:—that the sole power of making laws, is vested in the King, Lords, and Commons: and the attempts of any other set of men in the nation, particularly of Judges, ought to be repressed; for, where the legislative and judicative powers meet in one body of men, *Liberty is at an end* †.

It is also remarked, that the power of making rules for the conduct of business, and adding expedition to justice, is inherent in all Supreme Courts.—At the institution of our College of Justice by James V. this power was specially bestowed upon the Judges. By the Act 1540, § 93. ‘they are empowered to make such Statutes, Acts, and Ordinances, as they should think expedient, for ordering of process, and hastie expedition of justice.’—Our Parliament, however, conceived not that they were thereby devolving any share of legislation upon the Court of Session. Warnings of tenants, at that time, called loudly for reformation; but the reformation was not brought about by the Lords. It was to Parliament the country owed the Statute 1555, and not to an Act of Sederunt.—If, then, an Act of Sederunt was deemed incompetent to discharge even the then barbarous mode of removing tenants, how comes it that the Act of Parliament 1555, made on that account, has been abolished, after the approbation of ages, by the power of *an Act of Sederunt*?

Lastly—Supposing the Act anent removing of tenants had been a British Statute, it is asked, if the Court of Session would have chosen to promulgate the Sederunt 1756? If not, it is hard to understand what superiority a Scotsman ought to acknowledge in a British Statute, over one of our own national Parliament, *in viridissima observantia*.

HAVING thus stated the objections to the power of enacting this clause of the Act of Sederunt, I must, with equal freedom, pay a compliment to the expediency and justice of an alteration, which introduces simplicity, in place of a distressing set of forms, according to the manners of the modern times, altogether superfluous. The dependence of a process of removing in the Sheriff-Court, for 40 days preceding the term, is certainly equal, if not superior to the notifications in the Act 1555; unless we can suppose, that, since this Act was made, as all acknowledge, in aid of our tenantry, the Legislature meant to give them the advantage of a legal intrenchment in forms.

The summons raised by authority of this ordinance, recites the title of the pursuer, the Act of Sederunt, and expiration of the tenant’s lease. The decret obtained must be executed after the old manner, *i. e.* either by precept from the Sheriff, or by horn-ing, denunciation, and letters of ejectment.—I shall conclude my commentary upon this clause with a single observation, *viz.* That the words of it, after all, do not appear

* By the 1st of William and Mary, Stat. 2. c. 2. it is declared, That the pretended power of suspending or dispensing with laws, or the execution of laws, by regal authority, without consent of Parliament, is illegal.

† Montesquieu.

to be sufficient to authorise the removal of any tenants, but such as have possessed by *written leases*. The words are, 'Where the tenant had not obliged himself to remove without warning.'—This evidently presumes, that a written tack had subsisted between the parties, and was then expired. Accordingly the Act proceeds, 'It shall be lawful to the heretor, or other setter of the tack.'—From whence, with due deference, I apprehend that tenants possessing without tacks, or upon new bargains, after the expiration of the former ones, ought not to be removed upon this Act of Sederunt; for, all statutory laws ought, with us, to receive the same strict interpretation as in England; and there the right of a tenant by sufferance, *i. e.* after expiration of a lease, is considered as differing in many circumstances from a tenant-at-will.

- 3d Clause. 'WHERE a tack is assigned, and the assignation not intimated by an instrument; or where lands are subset, in whole or in part, to subtenants, and such horning execute as aforesaid; or where process of removing and decret is obtained; or where warning, in terms of the Act 1555, is used against the principal original tacksman, the same shall be effectual against the assignees or subtenants one or more; and the action of removing against the principal or original tacksman, and decret of removing following thereon, shall be effectual against such assignees and subtenants as aforesaid, and shall be sufficient ground of ejecting them; any thing in the former practice to the contrary notwithstanding.'

The foregoing *proviso* is intended to supply the real execution of the Act 1555, with respect to subtenants or others deriving right from the principal tacksman, all of whom were included in the feudal form of leaving a copy on the ground.—An assignee, without intimation, had no title, by common law, to be warned; and it was impossible to acknowledge him, unless he made his right known. From the moment he did so, he became, as it were, *principal tacksman*, and it was necessary that he should be warned. The warning directed by the Act 1555, was always effectual against such assignees and subtenants.

- 4th Clause. 'WHERE a tenant hath irritated his tack, by suffering two years rent to be in arrear, it shall be lawful to the setter or heretor to declare the irritancy before the Judge Ordinary, and to insist in a Summary Removing before him: And it shall be lawful to the Sheriff or Stewart-depute, or their substitutes, to find the irritancy incurred, and to decern in the removing; any practice to the contrary notwithstanding.'

It is likewise doubted, whether this article be within the power of the Court.—You have heard, that as, in the Roman contract of *location*, so in the Scottish *lease*, the failure in payment of two consecutive years rent *voided the contract*: But the fact must have been ascertained and declared by the authority of a Court, the rule being almost *verbatim* derived from the Roman Law. Now it was an early rule in our practice, that all actions tending to void or irritate the rights of the subject, are competent only before the Court of Session.—The importance of the suit entitled the subjects concerned to have them judged in the Supreme Court of the nation.—The irritancy of *leases or feus ob non solum canonem*, could only be declared by the Lords: And the earliest Statute in which these Judges are mentioned, declares, 'That they shall know upon all spoliations of tacks and mailings.'—By the Act of Sederunt, the Lords devolve that part of their jurisdiction upon the Sheriff; at least they give him a joint or cumulative jurisdiction in this matter with themselves.—This faculty of delegation, or devolution of power, it is said, does not appear to reside even in the *Supreme Court*.—

jurisdiction vested in the Sovereign Judges, is held to be *a part of the rights of the* which cannot be encroached upon.—So attentive was the Court of Session to that, in an early case reported by Hope, they found, ‘ That a declarator of right of a right could not be pursued before an Inferior Court, although the party submitted to it by private contract, and even come under express obligations for effect.’

HERE a tenant shall run in arrear in one full year’s rent, or shall desert his pos- 5th Clause.
session, and leave it unlaboured at the usual time of labouring; in these, or either of these cases, it shall be lawful to the heretor, or other setter of the lands, to bring an action against the tenant before the Judge Ordinary, who is hereby empowered and required to decern and ordain the tenant to find caution for the arrears, and for the rent of the rent for five crops following, or during the currency of the tack, if the tack is of shorter endurance than five years, within a certain time to be limited by the Judge; and, failing thereof, to decern the tenant summarily to remove, and to eject him, in the same manner as if the tack were determined, and the tenant had been legally warned in the terms of the foresaid Act 1555.’

is another case, which, at Common Law, gives the heretor a right to set aside the lease, and to remove the tenant. The action was considered as a *remedium extrajudicium*, rescissory in its nature, and important to the lieges: The Lords, therefore, in a great many cases, refused to allow the Sheriffs, and other inferior Judges, to entertain actions of that kind. Hence, this article in the Act of Sederunt became necessary, to bestow a new jurisdiction upon the Sheriffs; but, for the reasons already stated, the competency of this devolution is called in question.—In confining disputes to the subject; but the disposing of jurisdiction to others, is a very different matter, tho’ it is still in the power of the parties to be heard by the Supreme Court, in complaint against their sentence, yet that circumstance bears hard upon the tenant, who, by established law, was entitled to be brought before the Court of Session at the first instance. He lies under this additional and most material hardship, that a single Judge, in the Vacation, may shut the door of the Court against him, by refusing his bill of advocacy or suspension.

As a long time before leases of land were considered to be of any consequence to the tenant, distinct from the convenience of the tenant, and the affection which he entertained for the spot of his residence. The land was generally looked upon, by our tenants, to be worth no more than the rent, and, in corn-farms, (set at the rate of the rent) could only exceed it from real improvements, which it is well known, in Scotland, were very slow in their progress.—From this circumstance, the Judges, notwithstanding the Statutes in favours of tacksmen, considered leases of common endurance as rights of no great importance: And hence it happened, that when a tenant’s arrears to become due, his Master had little to do, but to alledge that he was *ad inopiam*; and to bring an action for obliging him to find caution for the arrears, and for the rent in time coming, otherwise to *remove*.—From the course of decision on this point (and there are many) it is too certain, that great oppression and wrong were committed, under the sanction of this idea, upon the poor tenantry of Scotland, whose leases were thereby rendered very precarious titles of possession. Arrears required to found this action, were generally *two terms*, or *one full year*, but the Court sometimes varied, according to circumstances. This process, like the

former irritancy, being a remedy of a nature still more extraordinary, was confined to the Court of Session, and is also *given up to the Sheriff*.—Upon a practice so severe, drawn from the ideas of Roman Masters, this clause of the Act of Sederunt is founded.—The caution formerly in the arbitrament of the Judge, is indeed limited to five years; which is an alteration of little consequence, as caution is seldom or never to be expected on these occasions. The Act adds another, and I think a better cause for the demand, *viz. the desertion of the farm*; which, in common law, and common sense, has always been looked upon to be a dereliction of the lease. The words are, ‘Or shall desert his possession, and leave it unlaboured at the usual time of labouring.’—A man may leave all or part of his lands unlaboured, without deserting his possession—a distinction which ought to have been made by the Act. And, in practice before the Sheriff, the Solicitors-at-Law seem to think it necessary to conjoin this kind of desertion (*i. e.* leaving a part of the lands unlaboured), with the arrear of rent, in order to give relevancy to their libel.—In Dr Boyd’s Judicial Proceedings*, we have the form of the summons, which not only states the arrear being due, but also that the defender has deserted his possession, and suffered part of the farm, *viz. a field, to lie unlaboured*.—By the letter of the Act of Sederunt, it is sufficient to libel the arrear, or the desertion.

Thus the practice carries a degree of severity somewhat inconsistent with the manners of the times, and which may often be abused to the purposes of oppression, contrary to the principles and intendment of the Act of Sederunt. If the tenant is industrious, his lease soon becomes a valuable property, of which he ought not to be deprived upon light grounds. A bad season, or other misfortunes incident to rural business, may oblige an industrious man to run two terms, or one year, in arrear; and a tract of hard weather in the Winter, may afford a pretence that his lands lye unlaboured, and give a bad master an opportunity of oppression.

I remember a case where all I have said literally happened,—where this very clause in the Act of Sederunt was perverted to the purposes of oppression.—Nicol Brown held a farm under the late G——— L——— of C———, Esq. The Harvest 1757 proved remarkably wet, so much so, that Nicol Brown, and the other tenants, had been unable to get their victual led home, and their stacks covered, sooner than Martinmas. Mr L——— gave Brown a charge of horning upon the term-day, and refused a large partial payment of the rent. A violent frost succeeded this wet weather, and continued late in the season.—This afforded a pretence that the lands were *unlaboured*. C——— brought his action before the Sheriff, upon this clause of the act 1756; obtained a decret, and turned the principal tenant, and sixteen families of cottars, out of doors, in a severe storm of snow. Three † of the neighbouring substantial tenants, from compassion to the poor people, took the farm for a year, though the season was far advanced; restored the houses to the inhabitants, and though these inhabitants *had been removed for leaving the lands unlaboured*, the new possessors cleared one hundred pounds of profit, and bestowed it on the sufferers.

To the honour of the late Lord Hopeton, it ought not to be forgot, that he, instead of adding to the severities of the season, gave his tenants in the same neighbourhood not only an ease of their money payments, but was pleased to credit them for their victual-rents till the next season, which proved a plentiful one ‡.

* Page 242.

† Mess. Thos. Hodge, Peter Baillie, and Peter Hay.

‡ This circumstance came out in evidence in the case here mentioned.

‘ and resting to the said E. F. for the room and lands, &c. (*Here the lands are specified as in the libel*) and that for crop and year 1780; as also, that the said E. F. as principal, or he the said A. B. as cautioner, sovery, and full debtor for him, shall content, pay, and deliver to the said C. D. or his foresaids, the sum of according to the conditions of the tack as to the rent, kain or carriages, and yearly, and for each of the crops and years 1781, 1782, 1783, 1784, and 1785, and that in manner and at the terms following, viz. (*Here the terms of payment of the year's rent for 1781, and delivery of the kain and carriages for that crop and year, are inserted*) and so furth yearly and termly thereafter, at the said respective terms during the year aforesaid, with a fifth part more of liquidate penalty for each term's faillie in payment of the money rent, in terms of the said tack.’

In the libel upon these removings, the Act of Sederunt is always specially recited as the authority for the action. This is right and necessary, otherways a process of removing brought upon other *media*, might at any period be inverted into a suit upon the Statute.—Thus, in a case, 4th July 1764, a process originally libelled upon a common warning, was attempted to be changed into a removing upon this Act, in regard that a libelled summons, called in the Court 40 days before the term, was thereby declared equivalent to a warning. The defence was a plain one.—‘ If an action be brought upon the Act, it must be *libelled on*, which was accordingly *sustained*.’

This part of the Act of Sederunt gives so great an advantage to parties who bring their actions before the Sheriff, that they ought in no case to be brought before the Lords in the first instance.

6th Clause. ‘ THE Lords hereby enact and declare, That no bill of advocation or suspension of a decret, or process of removing, be past, otherways than by three Lords in time of vacance, and by the whole Lords present in time of Session; provided always, that, in vacation-time, and when three Lords cannot easily be found, it shall be lawful to the Lord Ordinary on the bills, upon such bills of suspension, to grant sists from time to time as he shall judge proper, to the end that the complainer may have access to present his bill of suspension to three Lords, or to the Court. And they hereby ordain, That, upon passing such bill of advocation or suspension, or at least within ten days after the date of the deliverance thereon, the complainer shall be obliged to find sufficient caution, not only for the implement of what shall be decerned on the advocation or suspension, upon discussing thereof, but also for damage and expence, in case the same shall be found due: and, upon the complainer's failing to find caution as aforesaid, such bill of advocation or suspension shall be held to be refused; and it shall be lawful for the other party to proceed in his action of removing, or in the execution of his decret, as if no such bill of advocation or suspension had been presented or past.’

Thus access to the Superior Court is rendered a matter of difficulty, and loaded with conditions which cannot often be complied with by tenants. A single Lord may refuse the bill; but, to admit it, required three. When a decree is obtained against a party, a presumption of wrong is created against him; and he is refused the advantage of being heard by a Superior Judge, unless he assures his opponent of payment in the end, by finding caution in Court. But an advocation is a removal of a question not determined by the Judge; and there being no presumption against the pursuer of it, no caution is requisite. Here the Lords have confounded the distinction in favour of

The circumstance of three Judges being necessary to the passing of a bill to be very inconvenient to the parties, and distressing to the Court it-
fore, the Lords, by a subsequent Act of Sederunt, of date 10th Aug.
That any *two* of their number should have power and authority to
suspension and advocation of decreets of removing, when they should
to do.

is appointed to be taken for damages and expences, besides the sums
the advocation and suspension.—All bonds bear damages and expences
out of the charge. By this is meant violent profits; and this clause hangs
terror over the head of our country-people.—The bond, therefore, taken
suspension, differs in no part of the stile from other bonds in suspensions, but
the cautioner bound, that the tenant shall remove, and pay whatever
damages and violent profits shall be found due, in case of wrongful suspend-

of this kind must be exceedingly difficult to be obtained by tenants who
actions.—If it is not found, it behoves the tenant to yield his all up, *right*

do enact and declare, That, in all Removings, whether originally ^{7th Clause.}
before this Court, or by advocation or suspension, they will proceed and de-
be same summarily, without abiding the course of any roll: And ordain this
Sederunt to be recorded in the books of Sederunt, and printed and published
in form.

every proper resolution, and directly within the powers of the Court, for
solutions to expedite justice.—In common actions of removing, the rolls
dispensed with; and, by this article, advocations and suspensions of re-
put upon the same footing.

entered into a minute consideration of this most remarkable Act of Sederunt,
thought to be perfectly understood, and rendered very familiar to all practi-

intricate business of removing may be prevented in a very simple manner.—
of the lease may be made one or two years more than the parties intend it
subsist. For these last years, the lessee may be bound to pay *double rent*, un-
tion to remove at the intended term of expiration; or else, the tenant may
to sit at a term specified, and to pay so much more if he does not. Either
methods would be effectual, as conventional clauses are now literally executed
Court; but the first appears to be preferable, as carrying a less penal appear-
than the other.

d almost omitted to inform you, that the warnings upon the Act 1555, were an-
cept hanging over the heads of the tenantry for years, and removings sudden-
ted for. By these means, they were rendered, literally speaking, tenants-at-
and the inconvenience argued upon by Lord Kaimes, must have been severely
This abuse certainly became common, since we find an Act of Parliament in-
made in order to remove it.

It is statute and ordained be our Sovereign Lord, with advice of his three
ites in Parliament, That all Actions of Removing be persewed within three zeirs

‘ after warning ; with certification and they failzie, the warneris sall never be heard thereafter to persew the samin upon that warning *.’

In a question upon this Statute, the Lords found, that the prescription began from the time to which the tenant was warned, and not from the date of the precept.

The new actions of removing introduced by the Act 1756, are declared equivalent to the former warnings.—This prescription, then, I presume, will henceforth run from the terms at which the tenant is concluded against to remove.

BURGAL REMOVINGS.

THE inhabitants of burghs were originally an association of tradesmen, mechanics, or traffickers, without any mixture of strangers. It was requisite that all of them should be *Burgesses*, interested in the defence of the town, and subject to a share of public burdens. To ascertain this interest, it behoved each burgher to acquire a *bigged land* within a year and a day after his entry.—This property made his solid qualification ; and if the land was waste, or *unbigged*, he was obliged to rebuild it within a twelvemonth †. Afterwards, this qualification was fixed to the property of a rood of land, which paid 5d. of burrow-mail to the King.

You may remember, that burghs-royal are, *inter regalia*, held of the Sovereign, for burgal services ; and that the Magistrates are only his Officers, appointed for the civil government, and the administration of the revenues. The burghers, therefore, are upon equality ; none of them have any superiority or pre-eminence over their neighbours, or are capable, by themselves, of doing any act, or exercising any power within the jurisdiction of the place—a circumstance favourable to trade, and creative of ideas of liberty and independence.—Among the many privileges bestowed upon burghs from time to time, the most remarkable was, That burghs were amenable only to their own Courts. They were not bound to answer the summons of any other officers, but those of their Magistrates, in civil actions ; and none but these officers could, under the inspection of the Bailies, point one inhabitant for a debt due to another.—‘ It is ordained (says Balfour) That no officer shall point any person, indweller of any burgh, but ‘ the Provost, Bailies, and their officers ;’ and, in support of this rule of *Leges Burgorum*, he quotes a decision, 9th July 1538.

As the houses within burgh, were, without exception, the property of the burgher-inhabitants, we find, in our antient laws, no rules respecting the *Removings of Tenants* ; but we find many which regard the violent dispossessing them from their rights, or, as it is termed, *deforcement within burgh*. The principal of these Laws, is the Statute of Robert I. which enumerates the grounds of such deforcements or ejectments. The remedy was the same as in England—the action already mentioned of *nouvelle disseisine*.

So jealous, so contracted in their ideas, were the inhabitants of our antient burghs, that, in place of setting their houses to strangers, they refused even to lodge them above 24 hours †.

Afterwards, when manners altered, and people from the country chose to reside in towns for convenience and defence, houses and chambers came to be *let* by the pro-

* Cap. 82.

† Leg. Burg.

‡ Leg. Burg. c. 90.

ors, for the purposes of habitation.—The property devolved to strangers, who were inhabitants; and simple residence, joined to actual trade, were held to be qualifications sufficient to entitle to the freedom of the burgh.

A warning to remove is an act of jurisdiction, no inhabitant was entitled to exercise because he had no superiority over his neighbour; and therefore he applied to the Magistrates for a warrant to their officers, to warn by public authority; and we learn from Craig, that such was the established practice in his time.—‘In burrows (says he) is sufficient if the public officer, authorised by a verbal mandate from the Bailies, forty days before Whitsunday, warned the tenant of the house to remove. This warning needs not to be served, either personally, or at church: if it be done at the house itself, it is sufficient: and if nobody is to be found, that a mark of the notification should be affixed; for it would be improper that the owner of an urban tenement should be put to the trouble and charges of searching for the inhabitant, where-ever he might chuse to withdraw *.’

Thus removings within burghs were never held to come under the Statute 1555; in one or two cases, the Lords even sustained warnings within less than 40 days before term.

The authority of the Magistrates, however, continued to be required; and the form of practice was, that the officer who was employed, *chalked his name* upon the most prominent door of the house, and returned a certificate or execution of the fact.

In order to ease themselves of the burden of particular applications, the Magistrates in most towns, and particularly those of Edinburgh, in the beginning of each year,

issued a general warrant to their officer to execute warnings, at the desire of every headman who might employ them: and, from that time, the Bailies were no further troubled upon this head.—In many small burghs, however, I am informed that the rule was to be strictly observed. The Magistrates are jealous of their authority, and do not part with an *iota* of it.—In Edinburgh, so late as the 1700, a warning was objected to, upon account of the want of the Magistrates warrant. But the Lords

overruled the objection:—‘In regard that, as a precept under a Master’s hand is sufficient to remove tenants from land in the country, an heretor’s verbal order to an officer in burgh, where verbal orders are in practice, is sufficient, without the warrant of the Bailie;’ and no other account of this matter is given by Lord Bankton or Mr. Nicolson.

The forms in common practice were more attended to by our Systematic Writers, who would not remain so much in the dark for the *rationale* of many parts of the law.—Attend to the execution every day returned by officers in burghal removings—

Upon the day of 1778, I A. one of the town-officers of Edinburgh, passed by the command and desire of B. proprietor of a lodging or dwelling-house and pertinents lying at the cross of Edinburgh, and presently possessed by C.; and, by virtue of the said B. his order, *in his Majesty’s name and authority, and in name and authority of the Lord Provost and Magistrates of Edinburgh*, lawfully warned and charged the said C. to flit and remove himself, wife, bairns, servants, subtenants, goods and gear, and from the said lodging or dwelling-house, and pertinents thereto belonging, and to leave the same void and redd at the term of Whitsunday next to come, in the present year 1778, to the effect the said B. or others in his name, may enter the same, and peaceably possess, bruik, and enjoy the same in time coming thereafter;

‘ with certification, &c.—This I did, by *chalking the most patent door* of the said dwelling-house, as use is within borough ; as also made intimation of the said warning to the said C. personally apprehended, before and in presence of D. and E. also both officers of the said city *.’

This warning, you will observe, is extremely different from the precept of a country heretofore. It is done *in his Majesty's name and authority, and in the name and authority of the Lord Provost and Magistrates of Edinburgh*. But no man was entitled to use these names, without liberty asked and given.—Thus the form, of itself, gives complete evidence of the true origin of this urban ceremony.—The words of the execution, ‘ By virtue of the said B. his order,’ are improper in themselves, and rather uncivilly placed, *i. e.* before the authority of the King and Magistrates.—The execution should be thus : ‘ In compliance with the said B. his request, in his Majesty's name and authority,’ &c.

The officer, it is believed, at present chalks any figure he pleases upon the door.—If the tenant does not remove, a complaint is given in to the Bailies, which the practitioners term a *Summons of Removing*. The summons in Edinburgh, as I am informed, is written in the chamber of the Solicitor ; and the parties are cited upon it, without even the signature of the Clerk of the Court, or any other warrant ; than which nothing can be more loose, or adverse to every idea of judicial procedure.—It is summarily called, and decret given for removing and expences ; upon which a warrant of ejection follows, but not till a charge of six days upon the decret be expired—a circumstance attended with great inconvenience, and absurd in the extreme.

In country removings, ejections may be executed, as you have heard, the third day after the term of Whitsunday.—In tenements within burgh, each town is regulated in this respect, according to its custom, and order of its Magistrates.—From a decision of the Court of Session in 1670, it appears, that a slovenly practice prevailed in Edinburgh, of tenants remaining in their houses no less than *six weeks* after the term of Whitsunday. But now the time is ultimately fixed to the 25th of May, at 12 o'clock, when the warrant of ejection may be executed ; for, if one obstinate person is allowed to transgress in this particular, great inconvenience and distress ensues to many, who depend upon admission to each other's houses.

The form of the warrant issued upon these occasions, is in these words : ‘ At Edinburgh, the day of . Which day, John Grieve, Esq. Bailie, sitting in judgment, compeared, J. B. officer, who made faith, That he had lawfully charged the before designed A. B. to flit and remove himself, bairns, lodgers, goods and gear, furth and from the foresaid dwelling-house and pertinents, and instantly to leave the same void and redd, to the effect the pursuer, or others in his name, may enter thereto, and possess the same in time coming, conform to the foregoing decret, and execution thereof ; which he failing still to do, therefore the Bailies grant warrant, and ordain the officers of Court, to pass *with a Clerk of Court*, to the house before mentioned, and *inventory*, eject, and throw out the said defender, and his whole goods and effects therefrom, and put the pursuer in possession of the same, conform to the foregoing decret, and execution thereof, in all points.’

Hence we see that the ceremony of ejection is the same both in town and country, *viz.* ‘ The extinguishing of the fires, putting out of the furniture, and delivering the keys to the new tenant.’—In towns, the clerks of Court attend the officers, and

* Boyd's Jud. Pro. p. 329.

eful impertinent was termed the *Casual Ejector*, and against *him* the pretended Lessee ought his writ of injury and ejectment : so that, by this farce, solemnly ridiculous, the real possessor or proprietor might have been dispossessed of his property, without knowing any thing of the matter ; for such must have been the effect of the judgment, recovered.—But here the Court interposed by a *standing rule*, That unless the writ is brought against the actual possessor, due notice of the trial must be given to him.

In compliance with this, the casual ejector writes the real tenant a *letter*, informing him, ‘ That such an action is brought against him : that he has no business with the lands, and no intention to defend them ; and therefore, if he the tenant does not appear for his interest, judgment will go, and the possession be lost.’

This done, the *casual ejector* marches off: the real tenant appears upon the stage ; and, by another rule of Court, is admitted to state himself defender.—It then behoved the plaintiff-lessee, in the *first* place, to show the title of his author or lessor, and to bring distinct evidence of the *entry*, the *lease*, and the *ouster*, before he could open his mouth in the cause.

This mummery not only became tiresome and expensive, but, like all preliminary ceremonies, afforded arguments of *no process*, or, as we term them, *dilatory exceptions*.—At last, Lord Chief Justice Rolls, in the reign of Charles II. chased away the fictions from the field, by conjuring one up in the court itself. The Chief Justice ordered that his indulgence should be given to the real tenant, only *upon condition*, that he, *qua defendant*, judicially confessed, that the *entry*, the *lease*, and the *ouster*, had all been solemnly performed, altho’ not one of them ever existed. This confession is minutely reduced into writing with all the air of a *res gesta*, and intitled, *The common rule by which judgment is given in ejectment* ; and thus, as in the amusement of the Italian shades, one giant swallow swallows up the rest.

The Lord Chief Justice might do as he pleased ; but our friends, the attornies, did not understand raillery upon the subject. They have carefully preserved every one of these fictitious personages, who, together with all that they *did*, and all that they *said*, are to be found fully written down in the process even to this day *.

The preliminaries being all adjusted, the only question remaining before the Court, was upon the *title* of the real parties, *i. e.* of the *lessor* or the *plaintiff claiming the possession*, and that of the defendant *holding it*, which of consequence determines the *right property* ; and thus a possessory action is made to have the effect of a *real action*, or, as we would say, a process of ejection and intrusion is rendered equal to a *declaration* of property.—But the proceedings in these actions differ not so very much, either in form, expence, or duration, as to induce us to substitute the one for the other.

It may be thought I have been too particular in this description ; but you will find, in the sequel, that it was necessary to be thus explicit. Besides, an idea of these actions is of the greatest use, in running the parallel between many others of the Scotch and English forms, which is a part of the plan of these Lectures.

4 A 2

An observation of Lord Kaimes, upon a different occasion, may be, with much propriety, here applied.—Thus (says his Lordship) by strictly adhering to forms, without regarding substance, ‘ Law, instead of a rational science, becomes a heap of subterfuges and incongruities, which tend insensibly to corrupt the morals of those who make Law their profession.’

Thus, then, the removal of tenants in England, is a matter of as much solemnity, as the trial of the right of property of the farms possessed *.

In Scotland, we had anciently no other mode of trial of the right of possession, than that of the *Assise of nouvelle disseisine*, which is the father of the English ejectment; and, from these forms, we may plainly discover the *rationale* of these parts of our Practice, which subsisted at the time of the act 1555, of *Balfour*, and of *Craig*. They were nothing more than the remains of those laws, that, in the days of our Roberts and Davids, prevailed over the whole island.

A tenant by lease could not *then* be warned, till after the compleat expiration of his term: neither have the Lords in England any title to enter upon the lands, so long as the possessor's lease *subsists*. It is plain he could not be *disseised*, and therefore could not have an action.

The ceremony of removal in those days, *i. e.* the Landlord's coming upon the ground, and breaking a *disb*, was no other than the English *entry*, it being a part of the ceremony, to exhibit a symbolical mark of intention.

The English Lord, before he could *enter* and *oust* his tenants, must have had the right to the freehold compleatly vested in him. The Scots Lord must have been in-*feft*, and must be so at this moment, before he can insist in a removing.

Thus have I endeavoured to give you a general idea of the English procedure in the matter of Ejectment.—We shall now pursue it in detail, in order to discover its correspondence with *our own modern practice*. If the term of a lease expires, and no entry is made, or notice given by the Master, then such tenant is said to possess by sufferance, *i. e.* by *tacit relocation*: But if the proprietor chuses to have possession of the land, then, upon expiration of the lease, or at any time afterwards, he enters upon the ground, and says, 'I here enter and take possession of this land, and I desire you to leave the same immediately, with your goods, family, and cattle.'—This is equivalent to our warning. It is notice of the proprietor's intention, and a declaration that the sufferance is at an end; and that any possession thenceforth held by the tenant, will be *wrongful*.

A memorandum of this fact is made and signed by the person who makes the entry, before witnesses; which is exactly of the same nature with *our execution* of the *Precept of Warning*. If the tenant persists in holding over, the Lord takes out the writ of ejectment.—The service of the writ upon the casual ejector, and the notice given by him to the real tenant, are equivalent to the *Process of Removing* in Scotland.

These writs being all in established words, the particulars of the case, whereby they are made to apply to the parties, are specified in the form of a *declaration*, termed a *declaration in ejectment*.—'This must also (says Stair) have been so with us when briefs were used.' It now answers to our *summons* of removing; and, upon the point being tried, a judgment is given furth, attended with the same execution as our letters of ejection: but damages are seldom or never given in this action, because it is looked upon as a matter of common form, and often tried by consent of parties. An action of trespass is, therefore, next brought against the tenant, for *recovery of the profits*.—

* 'It is to be wished, (says the Hon. D. Barrington) that the fictitious proceedings in the common action of ejectment were altered. No client can possibly be made to understand the reason of such a fiction.—If it is answered, that there is no occasion for his understanding it, I still insist that mystery should always be removed.' *Obs. on the Statutes*, p. 117.

join these two in our process concluding for ejectment and violent profits, in one
1.

Tenants in England, who have no lease, are termed tenants-*at-will*; and their interest is said to be an estate *at-will*. So long, therefore, as the will of the Master continues, that tenant is presumed to hold rightfully. The tenant, in the same manner, continues at his own will; so that either party may alter or determine this interest when he pleases, in the same manner as tenants by verbal leases may do with us after expiration of the first year. The tenancy at will in England, was, for a long time, even in a literal acceptation: either party might put an end to it at any time of the year he chose, at least at any time at which the rents were usually paid up, *i. e.* at the quarter, half quarter, &c. This, in practice, must have been attended with great inconvenience, and therefore the Law early interposed.—‘If the Lessee (saith Littleton) soweth the land, and the lessor, after it is sown, and before the corn is ripe, let him out, yet the lessee shall have the corn, and shall have free entry, egress and regress, to cut and carry away the same.’

The estate at will is, in this case, terminated by the declaration of the Master, and the crop is only carried off by tolerance of the Law.—On the contrary, if the tenant comes up and thereafter sowed the land, the crop would belong to the Master, for then he is considered as a disseisor. For (says Lord Coke) ‘If the Master enters, the regress is a continuation of the freehold in him from the beginning.’—‘The same thing happens (says Littleton) if a tenant for years, which knoweth the end of his term, doth sow the land, and his term ended before the corn is ripe, then the lessor shall have the corn, because the lessee knew the certainty of his term, and when it would end.’—Well said, Littleton! (exclaims Lord Coke) ‘*which knoweth the end of his term*’; for, where the lease for years depends upon an uncertainty, as upon the death of a tenant for life, or of a husband seized in the right of his wife, or the like, *there* it is otherwise*.

From this case of tenancy-at-will, the reason is plainly discoverable, why, anterior to 1555, tenants without written leases could be warned at any time, while those who had them could not, till compleat expiration of their terms.—The former were tenants-*at-will*;—that *will* might cease at any time.—And hence, too, the utility of Scots Statutes appears in a separate light. All disputes respecting the improper removal of tenants-at-will, and the property of their crops, were at once prevented in Scotland, by the term of Whitsunday being fixed for all warnings, without regard to termination of the will of any party. And the plain expediency of such a measure, established almost the same practice in England:—‘The Courts of Law (says Judge Blackstone) have of late years leaned as much as possible against construing leases, where no certain term is mentioned, to be tenancies *at will*; but have rather held them to be *tenancies from year to year*, so long as both parties please; in which case, they will not suffer either party to determine the tenancy, even at the end of the year, without reasonable notice to the other†.’

When the English Writers mention the crop of the tenants holding over, as belonging to the Master, they term it *emblements*, from an old French word *emblemment de bled*, which signifies what we call *sprung corn* or *braided corn*.

1st Inst. lib. 1. § 68.

where we discover the principle of our ancient Statute of the 1st Act of Parliament, which protected the ten-

ants of life-renters, ward-lands, &c. These tenants did not know the end of their terms.

† Vol. II. page 147.

From all that you have heard, it is easy to conjecture, that, difficult as our removing were upon the Act 1555, these difficulties were nothing in comparison to the ejectment of tenants in England. There the evil grew to a great head; insomuch that, in the 1729, an Act of Parliament became necessary to regulate a matter of such universal concern.—An act was accordingly passed, *Quarto Georgii Secundi*, c. 28. It is intitled, ‘ An act for more effectually preventing frauds committed by tenants, for securing to lessors and land-owners their just rights, and to prevent frauds frequently committed by tenants.—Be it enacted by the King’s most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That in case any tenant or tenants, for any term for life, lives, or years, or other person or persons, who are, or shall come into possession of any lands, tenements, or hereditaments, by, from or under, or by collusion with such tenant or tenants, shall wilfully hold over any lands, tenements, or hereditaments, after the determination of such term or terms; and after demand made, and notice in writing given for delivering the possession thereof by his or their landlords or lessors, or the person or persons to whom the remainder or reversion of such lands, tenements or hereditaments, his or their agent or agents thereunto lawfully authorised; then, and in such case, such person or persons so holding over, shall, for and during the time he, she, and they shall so hold over, or keep the person or persons entitled, out of possession of the said lands, tenements, and hereditaments, as aforesaid, pay to the person or persons so kept out of possession, their executors, administrators, or assigns, *at the rate of double the yearly value of the lands, tenements, or hereditaments so detained*, to be recovered in any of his Majesty’s Courts of Record, by action of debt, whereunto the defendant or defendants shall be obliged to give special bail; against the recovering of which said penalty, there shall be no relief in equity.’

Here you will observe the very same devices to have been practised in both kingdoms.—Tenants, after process of removing them had proceeded great lengths, collusively introduced others into the possession.—Our common-law remedied this. A decret of removing, as before mentioned, is not obeyed with us, unless the possession is left *void and redd*.

A demand in writing is, by this Act, directly to be made.—It is singular, that no precise time, like our forty days, should have been fixed for such demand.—In Scotland, the *quantum* of damages, or violent profits, continues in the arbitrament of the Judge. Here, it is at once fixed to double value; and Judge Blackstone informs us, ‘ That it has almost put an end to tenancy by sufferance, unless with the tacit consent of the owner of the tenement *;’ *i. e.* in other words, It has at once swept away the whole trouble, forms, delays, and inconveniencies attending *the removal of tenants in England*. They are thus obliged to be more attentive to the delivering up of their possessions, than their Masters are to the receiving them.

I must now desire you to observe, that this capital improvement is brought about without infringing the ancient and established forms, however ridiculous such forms appear to strangers.—The English are peculiarly jealous of unhinging any part of their system; and, where the end can be attained by collateral means, it is a fixed rule with them, never to touch that fabric. The Statute we are considering, is a striking example of this: It does not, like our Act of Sederunt 1756, introduce a *set of new forms*; it

erves the old ones entire, and attains its purpose by a determinate penalty upon who shall venture to *abuse the common law*. Thus the demand or notice appointed by the Act, is not of the nature of an entry by ejectment; for, if the tenant chuses to continue at the double rent, or if the farm is really worth it, the tenant may possess himself to be removed by the ancient formal process*.

HERETO we have examined the English method of recovering the possession from tenants only where the lands are held at will, or by sufferance after the expiration of a lease, which are analogous to our ordinary or solemn removings upon the Act

are therefore, in the *next* place, to take a brief view of the extraordinary removing, *i. e.* of removing before the expiration of leases, or other rights by which the possession is held.—They are with much propriety termed *forfeitures*. These forfeitures, are founded upon the same principles with our own; but we shall find that the nature and execution of them have been materially different.

When a tenant ran in arrear of rent, the Master anciently *distraigned* his effects for it; and answers to the poinding of them with us, though there is a difference which I have noticed in another place: But if there were not effects sufficient upon the land, considered as deserted, and the Master had right to a writ termed *Cessavit*.—*Cessavit* (says Justice Rastall) is a writ that lies where my very tenant holds of me in lands or tenements, yielding certain rent by the year, and the rent is behind two years, and no sufficient distress may be found upon the land, then I shall recover the land. But if the tenant come into the Court before judgment given, and offer the arrearages and damages, and find surety that he shall cease no more in payment of the said rent, I shall be compelled to take the arrearages and the damages, then the tenant shall not lose the land†.

This writ is termed *Cessavit*, because it states that the defendant has ceased the usual payment of his rent for *two years per biennium jam cessavit*; and the action, like our action *ob non solutum canonem*, is directly borrowed from the emphyteutic forfeiture of Civil Law‡. The writ is authorised by two Statutes of the 1st and 13th of Edward I. But this forfeiture was known with us in the earliest periods of our jurisprudence; and it has been supported from the analogy of a Statute of James VI. regarding rights.

The Roman forfeitures were introduced into England with restrictions.—The writ *cessavit* did not lie, or was irrelevant, if there remained a sufficiency of goods, equal in value to the arrears, upon the land, open to the attachment of the Lord.—‘*That the lands were open to distress*,’ was a compleat defence; but if they were inclosed, so that distress could be taken, the writ continued to lie or be competent. Besides the arrears of rent, the lands must have lain *two years fresh, or unoccupied*, to entitle the Master to the benefit of the *Cessavit*, which was attended with much nicety of form, and was eventually defeated by bills in Chancery.

After fictitious ousters and ejectments became common, and practically useful in the

There is another good reason applicable to the present case.—The Legislature could not change the mode of removing tenants, without changing also the best method yet discovered, of trying questions of property.

† Termes de la Ley.

‡ The Roman Law required three years, à neglect, *per totum triennium*.

trial of the titles of all tenants and possessors of land without exception, the process of *Cessavit*, like many others of the ancient *actions real*, was seldom heard of in the Courts.—A tenant in arrear came also to be considered as a *disseisor*: for, if he kept possession of another man's land, without paying him the stipulated rent, he no doubt disseised or dispossessed the proprietor of his rent, or, in effect, of his lands themselves; consequently, he became guilty of a greater wrong or trespass, than the Landlord could commit, by dispossessing him of his term or lease*.

The process by re-entry and ejectment, therefore, lay, or was competent; and unless the arrear was paid by the tenant in Court, the ejectment proceeded, and the lease was forfeited.—Of consequence, it will at once occur to you, that the ejectment, in this shape, becomes equivalent to our reduction *ob non solutum canonem*.

In order to lessen the trouble, delay, and expence of these processes, clauses of re-entry were devised by conveyancers, and inserted in all leases, *i. e.* The Landlord stipulates, 'That in case of an arrear to an extent certain, being suffered by the tenant, he shall be at liberty to re-enter to the possession of the lands leased; and that the term shall, from that entry, cease and determine.'—We formerly considered these clauses under the subject of leases.—It is almost exactly to the same purport of our *brevi manu* expulsion. But the law of England prohibits all *brevi manu* proceedings; and therefore, the conventional power of re-entry gave not the lessor much advantage, either in time, convenience, or charges.—Still were the proprietors tied down to pursue the tedious process of re-entry and ejectment, with some small variations in their favour, drawn from the conventional allowance in the leases.—Here the *ejectment* again answers to our *declarator of irritancy* upon conventional clauses.

A subsequent *proviso* of the former Statute 4th George II. was intended to obviate these inconveniences.

'And whereas great inconveniences do frequently happen to lessors and landlords, in cases of re-entry, for non-payment of rent, by reason of the many niceties that attend re-entries at common law; and forasmuch as, when a legal re-entry is made, the landlord or lessor must be at the expence, charge, and delay of recovery in ejectment before he can obtain the actual possession of the demised premisses; and it often happens, that after such a re-entry made, the lessee, or his assignee, upon one or more bills filed in a Court of Equity, not only holds out the lessor or landlord, by an injunction, from recovering the possession, but likewise, pending the said suit, do run much more in arrear, without giving any security for the rents due, when the said re-entry was made, or which shall or do afterwards incur: For remedy whereof, be it enacted by the authority aforesaid, That in all cases between landlord and tenant, from and after the twenty day of June, One thousand seven hundred and thirty-one, as often as it shall happen that one half-year's rent shall be in arrear, and the landlord or lessor, to whom the same is due, hath right by law to re-enter for the non-payment thereof, such landlord or lessor shall and may, without any formal demand or re-entry, serve a *declaration in ejectment* for the recovery of the demised premisses; or in case the same cannot be legally served, or no tenant be in actual possession of the premisses, then to *affix* the same upon the *door of any demised messuage*; or in case such ejectment shall not be for the recovery of any messuage, then upon such *notorious place* of the lands, tenements, or other hereditaments, com-

* The simple non-payment of rent is termed an *arrear*, or action of debt, when no forfeiture of the lease is intended; and the remedy is by *disseisin*, by *subtraction*; and the remedy is by *disseisin*.

ch declaration of ejectment ; and such affixing shall be deemed legal serving such declaration of ejectment shall stand in the place and stead of a declaration of ejectment ; and in case of judgment against the casual ejector, or non-suit, for such lease, entry, and ouster, it shall be made appear to the Court where the said declaration was made, by affidavit, or be proved upon the trial, in case the defendant appears that a half-year's rent was due before the said declaration was served, and that the distress was to be found on the demised premises countervailing the arrears due, and that the lessor or lessors in ejectment had power to re-enter ; then, and in such case, the lessor or lessors in ejectment, shall recover judgment and execution in the same manner as if the rent in arrear had been legally demanded, and made : And in case the lessee or lessees, his, her, or their assignee or assignees, or person or persons claiming or deriving under the said leases, shall prefer judgment to be had and recovered on such ejectment, and execution executed thereon, without paying the rent and arrears, together with full costs, and without filing any bill or bills for relief in equity, within six calendar months after execution executed ; then, and in such case, the said lessee or lessees, his, her, or their assignee or assignees, and all other persons claiming and deriving under the said lease, shall be barred and foreclosed from all relief or remedy in law or equity, by writ of error, for reversal of such judgment, in case the same shall be erroneous : And the said landlord or lessor shall from thenceforth hold the said demised premises discharged from such lease : And if, on such ejectment, verdict shall pass against the defendant or defendants not confessing lease, entry, and ouster ; then, in every such case, the defendant or defendants shall have and recover his, her, and their costs and damages sustained by such lessor, person or persons entitled to the reversion or reversion as aforesaid, and perform all the covenants and agreements, made by him, her, or them, in the said lease, in and to the said premises, in his, her, or their part and behalf of the first lessee or lessees, are and ought to be performed.

It is further enacted by the authority aforesaid, That in case the said lessee or lessees, his, her, or their assignee or assignees, or other person or persons claiming title, or interest in law or equity, of, in, or to the said lease, shall, within the time aforesaid, file one or more bill or bills for relief, in any Court of Equity, such persons shall not have or continue any injunction against the proceedings at such ejectment, unless he, she, or they, do or shall, *within forty days next after the return of the writ of ejectment*, unless he, she, or they, do or shall, *within forty days next after the return of the writ of ejectment*, perfect answer shall be filed by the lessor or lessors of the plaintiff in such such bill or bills, and lodge with the proper officer, such sum or sums of money as the lessor or lessors of the plaintiff in such ejectment shall, in his, her, or their part and behalf, swear to be due and in arrear, over and above all just allowances, and costs taxed in the said suit, there to remain till the hearing of the cause, and to be paid out to the lessor or landlord on good security, subject to the decree of the Court. And in case such bill or bills shall be filed within the time aforesaid, or such execution is executed, the lessor or lessors of the plaintiff shall be accountable for the same, as much, and no more, as he, she, or they, shall really, *bona fide*, without fraud, or wilful neglect, make of the demised premises, from the time of his, her, or their entering into the actual possession thereof ; and if what shall be so made

‘ by the lessor or lessors of the plaintiff, happen to be less than the rent reserved on the said lease, then the said lessee or lessees, his, her, or their assignee or assignees, before he, she, or they, shall be restored to his, her, or their possessions, shall pay such lessor or lessors, or landlord or landlords, what the money so by them made fell short of the reserved rent, for the time such lessor or lessors of the plaintiff, landlord or landlords, held the said lands.

‘ Provided always, and be it further enacted by the authority aforesaid, That if the tenant or tenants, his, her, or their assignee or assignees, do or shall, at any time before the trial in such ejectment, pay, or tender to the lessor or landlord, his executor or administrators, or his, her, or their attorney in that cause, or pay in to the Court where the same cause is depending, *all the rent and arrears, together with the costs*; then, and in such case, all further proceedings on the said ejectment shall cease and be discontinued: And if such lessee or lessees, his, her, or their executors, administrators, or assigns, shall, upon such bill filed as aforesaid, be relieved in equity, he, she, or they shall have, hold, and enjoy the demised lands, according to the lease thereof made, without any new lease to be thereof made to him, her, or them.’

‘ This statute was copied (says Judge Blackstone *) from the antient writ of *Cessavit*, and may be satisfied and put an end to in a similar manner, by tender of the rent and costs within six months after.’—The preamble much resembles that of our Act of Sederunt 1756.—Let us compare them together.

The proviso in the Statute is intended to aid landlords who have a right of re-entry, upon arrears being due, *i. e.* as we say, by clauses irritant, and agreements to remove without process.—Our ordinance 1756 allows the heretor to *declare* that irritancy before the inferior Judges, and to remove the tenant. Though the action of declarator implies equitable powers in all other cases, yet here its nature is altered: if the year's rent has truly been incurred, the forfeiture is compleat; the irritancy remains only to be *declared* by the Sheriff, and the tenant has no relief either in law or equity.—Thus, tho' a tenant paid up his arrear, and obtained a discharge three days after the commencement of the process, the Sheriff, by authority of the Act, decreed him to remove, because the arrear had once been *actually incurred*. The Court, indeed, relieved from this, and found that it behoved the arrear to be due at the date of the decree, December 1763, *Campbell contra Robertson* †.—If this decision is followed, the rent may be paid in to Court; but the dependence is so short, that it will afford relief in very few instances.

The British Statute, in the case where rent is half-yearly due, allows the Landlord to serve a declaration in ejectment, *without previous entry or demand*.—The old form is thus so far shortened by force of the conventional clause: there is no ceremony of *entering*, and no *casual ejector*; but the declaration, in place of being served upon a stranger, and that stranger giving notice, is now served at once upon the tenant, and imports nothing more than our *Summons of declarator and removing upon the 5th clause of the Act 1756*.—The English mode of serving that declaration introduced by this Act, so exactly resembles our forms in warnings and removings, that one would be apt to think the former borrowed from the latter.—The confession of the *lease, entry, and ouster*, means no more than that the defender acknowledges his being properly *brought into Court*; or, as we would say, that the *summons and execution are unexceptionable*.—

* Vol. III. p. 233.

† According to the letter of the Statute, the judgment of the Sheriff was right.

process, by our late Act, can be brought, till a full year's rent becomes due, in any case. This is by no means *less severe* than the English Statute. The tenant is relieved, by the latter, *six months* even after judgement*, to get relief by a bill in Chancery, which is equal to our year's rent. But the great, the material difference is—no action upon the Statute is competent, where there remains *stocking or effects upon the land*. Accordingly, it must appear upon the trial, 'That no sufficient distress was to be found upon the demised premisses, countervailing the arrear then due.'

By our Law, as given us in the 1756, the extent of a tenant's moveables, or stock—though enough to discharge four times the arrear, affords no defence. 'Tis sufficient that he has not paid rent for a year.—May it not happen (nay it has frequently happened) that the tenant cannot make money of his produce? Does not this violate the antient and humane principle of our Law, which discharges a man's lands when seized, while he has moveables to be taken in payment? and, to a tenant, his possession is the same as property to an heretor.—What claim has the landholder, but for the produce of his lands?—To that alone he trusts in the contract of lease; and before, while the produce is in his power, he cannot be said to be injured, and ought not to be allowed to stretch his arm further against the labourers of the ground.—The English tenant is allowed, by the Statute itself, to pay his arrears:—the moment this is done, and costs discharged, his fears are over. But, by the Scottish Act, the extent of the arrear itself *works a forfeiture* of his lease, not indeed *directly*, but with *certainty in the end*: For, how are tenants thus exposed in a public Court, to find out for five years subsequent rent?—The demand must nine times in ten ruin the individual. If the year's arrears be paid up, are not the parties in *statu quo*?—Is not the security originally trusted to, *i. e.* the stocking and industry of the lessee, re-voiced?—What title, then, has the Master to more, in law, or in common sense?

The antient process of *Cessavit*, caution for terms to come was required of the tenant: but it will be remembered, that it not only behoved him to be *two years in the land*, but it must have been further established, that the lands had lain *fresh, and un-tilled for two years*.—Here was a solid foundation for a demand of security. The landlord had nothing else to trust to: he had no produce open to distress, and could place confidence in the industry of a tenant capable of such neglect.—The Law itself established a presumption against him, which he was obliged to take off by finding security.—The Act we are considering, is silent upon this head. The Legislature presumed that to be the consequence of neglect of labour; and as it paved the way to certainty, either of the arrears, or of the possession, the matter of neglect, or, as we term it, *desertion*, is left to be remedied by the antient process.—*Not so* our Act of Sederunt. If the tenant incurs a year's rent, or shall desert his possession, and leave it un-tilled at the usual time of labouring; in these, or either of these cases, the action may be brought, and the tenant must find caution for five years,' which is, in other words, *he must remove*. Thus, tho' the rent be regularly paid, the tenant may be distressed, and attached by his Master, under this Act.

That their Lordships considered to be *desertion* of a farm, is not described; and a legal term in statutory law, is a vice *in substantialibus*. They must have meant something different from leaving the lands in *fresh*, for the desertion is coupled with

This circumstance is equal to a delay of six months more at least, where delay is wanted by the

the words 'and leave the lands unlaboured.'—If it is meant that the tenant removes his family, there are many cases where he must do so.—Perhaps he takes a larger farm.—Perhaps there is not accommodation for him on the land; and tho' there is, the tenant resides in a village unconnected with it. The quarrel of the heretor, then, must be confined to the leaving the lands *unlaboured at the usual time of labouring*. These words are devoid of precision, and ought not to found any penal consequence.—In our very uncertain climate, it cannot be justly said that we have an *usual time of labouring*.—This enactment puts it in the power of the Master to bring a vexatious and oppressive action against his tenant; and I am informed, that instances are every day to be met with in the inferior Courts.—I appeal to the established form of their libel.—The circumstance of desertion is there stated as a *word of style*, without a meaning; and a part of a farm, nay a *single field*, left unlaboured, when the landlord is pleased to think it ought to have been otherwise, is made a *ground of action*.

It is in vain to say, that none of these abuses will be suffered by the Court of Session: nobody can doubt of it.—The Honourable Judges have repressed them on every occasion with becoming spirit. But still a law, the words of which may be stretched to cover oppression, must be a *bad law*: it gives an advantage to one part of the subjects against the other: it puts this advantage in the hands of that class, whose situation in life gives them a sufficient superiority.—Many tenants, I am told, sink under the weight of this Act of Sederunt, without a thought of opposition; and the remarkable instance of its abuse I formerly mentioned, came out entirely *by accident*, and not by means of the individual—He felt the iron-hand of oppression, but he imagined the law had *authorised it*.

The British Statute gives no relief against the process of ejectment, unless the arrear is paid in to Court, which arrear may be delivered to the Master, upon security.

The Sheriff, with us, by the Act 1756, answers to the Court of King's Bench; for he ought to judge according to the letter of the Act of Sederunt.—The Court of Session becomes our Court of Equity, where alone the tenant can seek relief; and the bill in Chancery corresponds to our bill of suspension or advocation. An injunction to *stay proceedings at law*, is granted upon the Chancery bill; we obtain a *sist* upon our bills. The application in Scotland may be refused, and access denied to our Court by a single Judge; and it is the purpose of the sixth article of the Act of Sederunt, to render the admission into Court still more difficult. Tho' *one Judge* may refuse, it requires *two*, or the whole Court, to pass the bill: but if the tenant obtains this, he must find caution for the consequences, damages, and expences; whereas, by the British Act, the arrears and taxed costs are only paid in to Court. In short, the principle of the Act of Parliament is 'the recovery of the arrears justly due by the tenant, or, in default thereof, the recovery of the possession, under every chance to the tenant of preserving it.'—The intention of the Act of Sederunt 1756, was doubtless the same. The public good, and the consideration of justice, could alone influence our Honourable Senators; but, to judge of this ordinance by *the letter*, a stranger would be apt to conclude, That the principle of it was 'the recovery of the possession, whenever Landlords shall find it agreeable to their pleasure or their interest.'—By the Act of Parliament, the English proprietor runs the risk of losing a year's rent, *in lieu of his recovery*; for tho' the land be deserted, according to our understanding of it, he cannot bring his ejectment till after *six months*, nor execute it in less than *a year**—whereas,

* i. e. If the tenant chuses to prevent him.

notch regulations, the Landlord is protected from the possibility of loss, and advantage of every chance for destroying his tacksman's right.

————— ' Ye Masters ! then,
 ' Have mercy on the rough laborious hand,
 ' That sinks you soft in elegance and ease :
 ' Be mindful of those limbs in russet clad,
 ' Whose toil to you is warmth and graceful pride ;
 ' And, oh ! be mindful of that sparing board,
 ' Which covers your's with luxury profuse.' THOMSON.

arraigning this ordinance of our Supreme Court, it would be partial, it would be unjust not to declare, That, in the execution of it, our present Judges seem by the humanity which inspired these lines of the poet of our country. They give the tenant every chance of preserving his possession : they give him every delay the law forms can afford. By this conduct, it seems tacitly to be acknowledged, that the Act 1756 has been made, as the great Bacon finely expresses it, *upon the spur of passion* ; and that it is sometimes more honoured in the *breach* than in the *observance*.

In tracing the history of this subject, we have seen that the law and practice both in England and Scotland, were, in *the matter of removing*, (as in every other branch) the same. The entry of the Lord, the ejectment and ouster of the Tenant, were, literally understood, and literally executed.—The English Legislature soon converted these barbarous manners into mere form and sound.

Our early ancestors obeyed laws of every kind with reluctance ; and if, in the reign of our more ancient Princes, the matter of disseisine and ejectment had been under controul, it is certain that all ideas of that kind were afterwards lost. The nobility, and great Proprietors continued to attack, oust, and eject tenants and to support their force of arms ; and the tenants learned to defend their possessions, and to resist the disseisin of their Lords by the same means : hence it came to be totally forgot, that we had any law, rule, or order in this business. The English still retain the forms of their old forms,—while a set of new rules got footing with us, which had no parent relation to the ancient practice ; and hence, in Scotland, tenants are *warned and removed*, while, in England, the uncouth terms of remote antiquity are preserved amidst the gentlest manners.—They are said to be *entered upon*, and *ejected*.

Landlords are men, to whose minds the idea of property in land may be alone present, and who think every restraint upon their powers unnatural and impolitic.—Let those who are in this manner recollect, that the monied interest of the kingdom, is, by laws, restrained from taking annual rent, unless according to certain rates and conditions prescribed.—Land is the principal stock of every nation, and the principal sub-
 ject of industry. By abusing their right, land-holders hurt the community, more essentially than money-holders can do. They render miserable the most useful and most industrious class of men : they stifle the exertion of that industry, upon which every thing depends.—Why the landed interest has not been laid under restriction, as well as the monied, can only be answered, by observing that the body of our Legislature has been borrowers of money, and proprietors of land. The practice of giving

land in leases, and other modes of bestowing security upon the possessor, has restored in some measure, the natural rights of mankind; it has made the soil once more the common mother.—Location, the *emphyteutæ*, were unknown to Old Rome in the time of the Gracchi; and it has been well remarked, that, had they been well known, the convulsions of that period, occasioned by the unequal distribution of lands, would have been prevented. Under the feudal law, the lower class of people was protected by the assistance given to their Chiefs, and by the mutual attachment naturally created between men equally exposed to danger, and engaged in perpetual war.

Feudalism is now no more: it has disappeared before the spirit of commerce.—If landlords are not influenced by manners, by feeling for their species, immediate interest, in these days, points at their industrious tenants only as sponges to be squeezed.—The Master studies an insidious vigilance, which he terms ‘Attention to his affairs;’ and the tenantry are oppressed, debased, corrupted.—Hence that low cunning, that little over-reaching disposition, which we often blame in country-people.—Alas! these are the arms which Nature puts in the hands of the oppressed. The prevalence of such vices among the lower class of mankind, is an unerring sign of oppression and poverty.—Go to England: there, an honest blunt simplicity forms the general character of their country-people.—It is needless to ask, Why?—Public propriety, and solid improvements, have always attended the wise, humane, and generous administration of the Landlord’s private right. And it is an observation of the most judicious political writers, That England owes its lustre, and its power, to her Nobility and Gentry having far excelled the Peers of all other nations, in this public virtue*.

* Essay on Property in Land.
Hints to Gentlemen of Landed Property.

N. B. The following description of the French Peasantry is given, as it were but yesterday, by Mons. de St Lambert, the elegant Author of *Les Saisons*—

‘ Helas ! dans nos climats, le peuple des hameaux,
‘ Rendu stupide enfin par l’excès de ses maux,
‘ Ne sait point par son art, seconder la nature ;
‘ L’habitude et l’instinct dirigeant sa culture,
‘ Il n’invente jamais, et tremble d’imiter,
‘ Pour cesser d’être pauvre, il n’ose rien tenter ;
‘ Il traîne avec effort sa vie infortunée,
‘ Et pense qu’aux douleurs les dieux l’ont condamnée.’

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